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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1976

No. 75-1733

SALLY LEE SIMON, *Petitioner*

v.

CHARLES SIMON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the District court of Appeals of Florida, Third District, which reversed the Order of Judge Major B. Harding, Circuit Court, Dade County, and held the parties' rights to the property in Pennsylvania were adjudicated as a matter of law, is reported at 293 So.2d 780 (1974) (table) and appears at page A11 of the appendix to this petition. The opinion of the District Court of Florida, Third District, affirming the Summary Final Judgment order issued by Judge Major B. Harding, Circuit Court, Dade County, is reported at 317 So.2d 83 (1975) (table) and appears at page A17 of the appendix to this petition.

JURISDICTION

The judgment of the District Court of Appeals of Florida, Third District, was entered on July 29th, 1975; a timely Petition for Rehearing was denied on September 11, 1975, and a timely Petition for Writ of Certiorari was denied by the Florida Supreme Court on March 10th, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE QUESTIONS INVOLVED

I. Can the courts of Florida utilize a judgment entered by operation of law not on the merits which directly affects title to real estate in Pennsylvania, by an extension of its *in personam* jurisdiction, in contravention of prior doctrine established by the United States Supreme Court, for the purpose of denying the petitioner the right to continue actions in Pennsylvania asserting claims to real estate situate therein?

II. Can the said Florida judgment, obtained by operation of law, be the basis for enjoining the petitioner from continuing her law suits in the State of Pennsylvania where it appears that under the legal principles in the State of Pennsylvania, the said judgment would not be accorded full faith and credit because it was not obtained on the merits, purports to affect the title to real estate directly contrary to the doctrine established by the United States Supreme Court and the conveyances in Pennsylvania are by a husband and wife to husband and others without consideration and the wife's signatures to the deeds in question were forged?

III. Can the said judgment be made effective to determine the title to the real estate in Pennsylvania and by its injunctive powers restrain and prohibit the petitioner from continuing her law suits in Pennsylvania where the judgment resulting from operation of law in Florida is contrary to the Pennsylvania Public Policy?

STATEMENT OF THE CASE

This petition seeks review of the decision of the Florida District Court of Appeals, 317 So.2d 83 (1975), which affirmed a lower court order enjoining petitioner and depriving her of her right to continue to assert in the courts of Pennsylvania, her claims to Pennsylvania real property, which under the existing facts and applicable federal and state law, would not accord full faith and credit to the said judgment. The Florida Supreme Court on March 10, 1976, denied a Petition for a Writ of Certiorari.

The Petitioner, Sally Lee Simon, was, at various times in 1969, a tenant by the entireties, with her then husband, Charles Simon, of a variety of real property located in Philadelphia, Pennsylvania, valued in excess of $4,000,000 (accruing annual income in excess of $400,000). She was divested of her interest by deeds naming her and her husband as grantor and her husband and others as grantees. Her signatures on the deeds were forged. There was also no consideration paid to her in said conveyances and the deeds so recite.

In late 1971, the petitioner instituted several actions in the Court of Common Pleas of Philadelphia County against Charles Simon and others seeking to recover her interest in the Pennsylvania real estate consisting of shopping centers and apartment house projects and an accounting of the accruals therefrom which has been collected and retained by Charles Simon.

In four of the principal actions pending in the Court of Common Pleas of Philadelphia County, Charles Simon alleged as the basis for successive motions for judgments on the pleadings the entry by the Florida courts of the judgment for which review is being sought. On March 14, 1975, the court denied the successive motions of Charles Simon for judgment on the pleadings predicated on the said Florida judgment. Subsequently, a Petition for Reconsideration was granted and on November 17, 1975,

further proceedings in that connection were stayed pending a final determination of the Florida litigation.

The various Florida proceedings have developed as follows:

On December 27, 1968, petitioner filed a Complaint in Divorce in the Circuit Court of Dade County, Florida. After a brief reconciliation in 1969, the action was reactivated and on April 14, 1970, Charles Simon filed a Counterclaim against the petitioner.

Subsequently, Charles Simon attempted to amend his pleadings to bring into issue, in the Florida proceeding, the property rights of the parties to the aforementioned Pennsylvania real estate. The petitioner opposed these efforts, contending, *inter alia,* these issues were being fully litigated in the Pennsylvania courts. The Florida trial court disallowed the amendment as untimely and directed that the case proceed to final judgment without an adjudication of those property rights.

On March 20, 1972, the Florida court entered a Final Judgment Dissolving the Marriage and adjudicated only the Florida real estate then owned by the parties. (A1)

On October 24, 1972, Charles Simon filed a Complaint for Injunction in the Circuit Court in Broward County, Florida. He sought to enjoin petitioner from continuing the Pennsylvania actions to recover her interests in Pennsylvania real property. Mr. Simon claimed he was suffering irreparable injury as a result of the Pennsylvania law suits, and the property rights to the Pennsylvania real estate which petitioner asserted in these actions were finally and conclusively settled and determined by operation of law under the aforesaid judgment.

The power of the Florida court in extending its *in personam* jurisdiction and directly effecting the title to the real estate in Pennsylvania in contravention of the applicable decisions of this Court, came about in the following manner.

The Complaint for Injunction was transferred to the Dade County Circuit Court and assigned to Honorable

Major B. Harding, who had presided over the divorce proceedings. Judge Harding struck those allegations of the Complaint for Injunction which asserted that the claims to property in Pennsylvania were adjudicated in the divorce action holding that:

> "Inasmuch as the ownership or property rights of the parties was the subject of actions pending in the Pennsylvania courts at the time of the final judgment of dissolution of marriage hereinabove referred to, this court does not deem it appropriate to determine whether said judgment divested the Pennsylvania court of its jurisdiction or otherwise acted as a bar to further proceedings there."

Judge Harding's order striking those allegations, was appealed by Charles Simon. The District Court of Appeals reversed, holding that by operation of law, all property rights of the parties were conclusively determined by the divorce decree in spite of the fact that the parties were litigating some of those claims in the Pennsylvania courts at the time the decree was entered. 293 So.2d 780 (1974).

On the basis of this reversal and remand, the trial court entered a Summary Final Judgment in favor of Charles Simon on October 24, 1974, permanently enjoining the petitioner from prosecuting all actions then pending in the Court of Common Pleas of Philadelphia County claiming an interest in the Pennsylvania property formerly owned by the parties as tenants by the entireties and now by Charles Simon, based on facts or circumstances which existed prior to March 20, 1972, the date of the final divorce decree.

The summary judgment injunction was appealed to and affirmed by the District Court of Appeals of Florida, Third District, 317 So.2d 83 (1975).

A timely petition for rehearing was denied. Petitioner filed a petition for writ of certiorari in the Florida Supreme Court, which was denied on March 10, 1976.

The issues involved herein were raised in the Florida proceedings.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. (a) The Florida anti-suit injunction contravenes the prior decisions of this Court which restricted the power of a state Court to annul a deed or to establish a title beyond the borders of its jurisdiction by a direct decree.

(b) Under the facts and applicable legal principles, the Pennsylvania court would not give full faith and credit to the Florida judgment.

(c) Petitioner is being deprived of her right to establish the Florida judgment is not *res judicata* in her proceedings in Pennsylvania.

The anti-suit injunction, which is the subject matter of this petition, was issued by the Florida trial court in a summary judgment proceeding. The injunction was issued without an opportunity for petitioner to answer the complaint for injunction on the merits.* The trial court specifically held that it was authorized to issue the injunction because, as a matter of law, "the Final Judgment Dissolving Marriage of the parties, aforesaid, *was by operation of law a bar to the seven actions* described in [Charles Simon's] complaint *instituted by* [petitioner] against [Mr. Simon] *in the courts of the State of Pennsylvania*, in

*The portions of the complaint on which the trial court relied in issuing the injunction were originally stricken by that court. When they were reinstated by order of the District Court of Appeals, petitioner sought leave to amend her answer to the complaint to respond to those allegations. Without allowing the amended answer, the trial court granted summary judgment in favor of Charles Simon and issued the injunction.

which she claimed special equities and other property rights in the separate property of [Charles Simon] located in that state." (emphasis added)

This decision was affirmed by the District Court of Appeals.

II. (a) The Florida court in projecting in Pennsylvania the force of the divorce decree by means of extending its *in personam* jurisdiction, will deprive the petitioner of the right to establish, in Pennsylvania, the said judgment is bereft of full faith and credit in Pennsylvania.

(b) The Florida divorce decree on which is superimposed the injunction, as interpreted by the Florida courts, is one which directly affects title to Pennsylvania real estate and, as such, is not entitled to recognition by the Pennsylvania courts as established by the doctrine enunciated by the United States Supreme Court.

(a) The landmark decision which defines the outer parameters of the power of a court in one state to decide title to real property located in another state, is *Fall v. Easton*, 215 U.S. 1 (1909).

In *Fall*, a husband and wife were divorced in the State of Washington. At the time of the divorce, the spouses owned a piece of real estate in Nebraska. In the divorce case, the husband claimed the property was his alone, the wife claimed that it was community property, and asserted a claim to be declared sole owner. Washington State law directed a court, in granting a divorce, to "make such disposition of the property of the parties as shall appear just and equitable. . . ." The Washington court found in favor of the wife as to the Nebraska real estate and appointed a commissioner to execute a deed to her. The husband, meanwhile, sold the property to Eastin and a deed to that effect was recorded. The wife then brought an action to quiet title in Nebraska.

This Court held that the Washington decree was not entitled to full faith and credit, since it purported to *directly affect* title to real estate in Nebraska:

> "The territorial limitation of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person, may *indirectly act upon real estate* in another state, through the instrumentality of this authority over the person." *Id.* at 8. (Emphasis added)

However, while the Florida court seeks to exercise its *in personam* jurisdiction, it is, in effect, implementing a decree by which it directly effected the title to the Pennsylvania real estate.

Most of the cases which have arisen in this area since *Fall*, involve an attempt by the foreign court to bring about some change in record ownership. In such cases, the distinction between direct and indirect normally turns on the precise manner in which the foreign court seeks to bring about this change. Thus, a decree is indirect (and hence valid) if it simply acts upon the party; that is, it orders the party to transfer the property to the other spouse and such a transfer is accomplished by the party pursuant to the order. A decree is direct (and hence invalid) if it purports to operate thru the force of the judgment automatically, or through an instrumentality of the court, such as a commissioner.

In the present, case, the petitioner asserts claims to parcels of real estate which are, at the present time, titled in the name of Charles Simon and others. The effect of the Florida divorce decree is to extinguish, forever, the petitioner's claims. The Florida judgment is projected into Pennsylvania, and by its force seeks to determine directly the title to the Pennsylvania real estate.

In *Sharp v. Sharp*, 166 Pac. 175 (Okla. 1916) (citing *Fall v. Easton, supra*), the parties were divorced in Oregon. In the divorce proceedings, the wife, Jennie Sharp, claimed an interest in a parcel of Oklahoma real estate which was *titled* in the name of the husband, Landis Sharp.

The decree of the Oregon court stated:

> "That plaintiff, Landis Sharp is the owner of [the Oklahoma real estate], free from all right, title, interest, estate and claim forever of defendant, Jennie Sharp;"

Landis Sharp later brought suit in ejectment in Oklahoma seeking recovery of the real estate in question. He introduced the records of the Oregon proceedings and on that basis alone the trial court found in his favor. However, the Supreme Court of Oklahoma reversed.

The husband claimed the decree of the Oregon court was *res judicata* and the Oklahoma court said:

> "This argument has some force, but nevertheless it seems that the decree of the Oregon court does in fact, not through any act required of the person, Jennie Sharp, *but through the force of the decree itself*, determine the validity of the asserted rights of Jennie Sharp in and to the real estate, and thus, *not indirectly but directly, affects the title or status of lands in Oklahoma*. Otherwise of what force is the decree when introduced in the instant case. Jennie Sharp is asserting an equitable title to the Orchard Park property. To meet this assertion Landis Sharp introduces the record of the Oregon decree, claiming that it bars Jennie Sharp's asserted rights. Its effect, so taken, is to establish Landis Sharp's title, yet this is the very thing which the Supreme Court of the United States in *Hart v. Sansom*, supra said a court of equity could not do.
>
> 'But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts in per-

sonam, by compelling a deed to be executed or canceled by or in behalf of the party. *It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title.*'

"We conclude, therefore, that the effect of the Oregon decree, in so far as it related to the real estate, was to establish the title to lands in Oklahoma, and thus far *it was beyond the jurisdiction of that court coram non judice, and void.*" 166 Pac. at 178. (Emphasis added)

For additional decisions similar to *Sharp*, see, e.g., *Barker v. Barker*, 331 P.2d 628 (Calif. 1958); *McRary v. McRary*, 47 S.E. 2d 27 (N.C. 1948).

Petitioner contends the *Sharp* analysis is correct. A decree which purports to *recognize* title in one party, although an actual *transfer* of title is not accomplished because that party already holds *record* title, is a decree which *directly* affects title to real estate and is beyond the power of the issuing court.

The Florida courts are now giving to their divorce decree an effect not sanctioned by the foregoing decision. A decision by this Court to grant certiorari will be of substantial assistance to the state and federal courts in their efforts to correctly interpret a leading decision of this Court and put at rest the determination of a substantial constitutional question. It will effect, not only Sally Lee Simon, but property owners and claimants throughout the United States.

(b) The absence of consideration in the conveyance in itself denies any title to Charles Simon under Pennsylvania law.

Assuming arguendo that the transfer of the property from Sally Simon to Charles Simon was valid and not based on a fraudulent transfer of the property by Sally Simon's forged signature, Pennsylvania law cogently dictates the transfer of Sally Simon's property to her husband created a rebuttable presumption of a trust in her favor. In a leading Pennsylvania case, *Shapiro v. Shapiro*, 424 Pa. 120 (1966), the Supreme Court, in its rigorous analysis of the issue, commented at page 128-129 as follows:

"Our case law on this subject is well settled. As stated in *Darlington's Appeal*, 86 Pa. 512, 528 (1878) —a landmark decision—: 'A transaction between persons so situated [as wife and husband] is watched with extreme jealousy and solicitude, and if there be found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.' The Court went on to state that: 'Owing to the near connection between the parties . . . , the transaction in itself is considered so suspicious as to cast the burden of proof upon the person who seeks to support it, to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and conscientious.' (at p. 518). *Moreover, where a husband obtains his wife's property without adequate consideration, a rebuttable presumption arises that a trust is created in her favor*, and, if the husband claims a benefit arising from the transaction, he must *show affirmatively* that he acted in good faith and took no undue advantage of his wife: *DeBarnard v. DeBernard*, 384 Pa. 194, 196-197, 120 A.2d 176 (1956)." (Emphasis supplied)

It is patent from a review of the proceedings in Pennsylvania, which the Florida decree seeks to enjoin Sally Simon from pursuing, that Sally Simon's right, title and interest to various parcels of real estate holdings in Philadelphia were taken without any compensation of any kind whatsoever to her. In view of the above cited Pennsylvania case authority, the enforcement of the Florida decree for this reason alone is unconscionable and will not be en-

titled to "Full Faith and Credit" pursuant to Article IV, Section 1, of the Constitution.

C. Judgments in foreign states not on the merits or where an issue is withdrawn by the first court, cannot act as *res judicata* to claims in Pennsylvania.

It is particularly appropriate and important to note the following pertinent part of the Opinion of trial Judge Harding issued on October 16, 1973: (A8)

> "In the dissolution proceeding the husband, (Plaintiff here), sought to have property rights of the parties to the Pennsylvania property litigated and made a part of the final judgment of dissolution of marriage. These efforts were resisted by the wife, (Defendant here), and the court, by order refusing to permit the amendment to pleading for not being timely filed, permitted and directed the matter to proceed without an adjudication thereof in the final judgment. Both parties, here and there, were well aware that failure to adjudicate these property rights in a final judgment dissolving a marriage might bring into effect an adjudication thereof by operation of law.
>
> "In said dissolution action, the undersigned having rendered said judgment, the Pennsylvania property for the purposes of the dissolution was conceded to be in the name of the husband. (Plaintiff here). It was also known to the court that there was, as alleged in the Plaintiff's complaint in the instant cause, pending the actions in the Pennsylvania courts relative to the interests of the parties therein.
>
> "The court, in the dissolution action, *did not have the property rights of the parties to the property in Pennsylvania before it as an issue to be determined by final judgment.* Therefore, the final judgment did not adjudicate those property rights except as they may be adjudicated by operation of law." (emphasis added)

Under these circumstances, several interrelated principles operate to make the claim of res judicata inapplicable to Pennsylvania cases, notwithstanding the result that apparently would obtain if these were cases that *involved Florida real estate.*

The following two sections from the RESTATEMENT OF JUDGMENTS would appear applicable to the present situation:

> "§49. Judgment for Defendant Not on the Merits.
>
> Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided.
>
> "§67. Where First Court Makes Erroneous Ruling that Recovery Can Be Had Only in a Different Action.
>
> Where in an action the court holds that the plaintiff cannot enforce a particular claim in that action on the ground that he can enforce it only in a separate action, the judgment does not preclude the plaintiff from enforcing the claim in another action, although in the second action it appears that the holding of the court in the first action was erroneous."

Substantial judicial support for these principles exists in Pennsylvania. See, *e.g., Killion v. Wright,* 34 Pa. 91 (1859); *Steelman v. Sites' Executors,* 35 Pa. 216 (1859); *Healey v. Bowman,* 271 Pa. 293 (1921); *Fogel Refrigerator Co. v. Oteri,* 398 Pa. 82 (1960) ("Courts should not be astute to close their doors upon the merits"); *Haefele v. Davis,* 399 Pa. 504 (1960); *Reading Co. v. Spink,* 263 Pa. 445 (1919), and *Parks v. Pennsylvania Clay Co.,* 60 Pa. Super. 567 (1915).

It is clear from the Opinion of Judge Harding that he "directed the matter to proceed without an adjudication

[of the claims to the Pennsylvania real estate] in the final judgment." It would be unconscionable for the plaintiff to now be barred from raising her substantial claims by reason of the failure of the Florida trial judge to consider those claims especially where petitioner's request to amend her answer was denied. (See footnote at page 6.)It is submitted the application of section 67, RESTATEMENT OF JUDGMENTS, supra, is designed to prevent such a manifest injustice.

D. The doctrine applied by the Florida Court by operation of law is repugnant to Pennsylvania policy.

The RESTATEMENT, SECOND, *Conflict of Laws*, §103 states:

> "A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State."

One recognized area where foreign judgments are not entitled to full faith and credit involves judgments affecting title to realty outside the state where the judgment is rendered. *In Re: Reynold's Will*, 85 N.W. 2d 553 (N.D. 1957).

In the present case, there are two important and distinct policy issues involved. First, there is a difference between the laws of Florida and Pennsylvania concerning the requirements that property claims be adjudicated at the time of divorce. Florida law generally requires that property claims between spouses be determined at the time of a divorce. Pennsylvania law, on the other hand, is diametrically opposite. In Pennsylvania divorce proceedings, property claims between spouses may not be litigated; rather, such claims must be brought separately, without regard to the pendency of divorce proceedings, and they will proceed without regard to the divorce proceedings.

Florida courts have adopted the concept that all claims between spouses be litigated at one time. It is apparent Pennsylvania courts have no such policy.

The second policy consideration is based on the obvious fact that if Charles Simon's contention is sustained, Sally Simon will be deprived of substantial property rights without ever having had those rights considered, on the merits, by any court. Such a result would clearly constitute a deprivation of her property without due process of law. And, in this connection it is no answer to state she had her chance to raise these issues in Florida and by failing to do that has now forfeited her claims, especially where it appears the trial judge denied she might litigate the issues in question and subsequently refused an amendment for the issues to be framed.

It is the function of the United States Supreme Court to determine whether judgments are consistent with the Federal Constitution. Under the Due Process provisions of the Fourteenth Amendment, no citizen may arbitrarily be deprived of his property. Sally Simon's right, interest, and title to the property in Pennsylvania would be extinguished by the decree of the Florida court, which existence is solely a result of Florida operation of law. Moreover, the Florida decree is a violation of petitioner's constitutional guarantee pursuant to the Fourteenth Amendment, since her property rights are being directly affected by a decree which was by operation of law and not on the merits.

A case which may be considered with respect to the case *sub judice*, is *Hanson v. Denckla*, 357 U.S. 257, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). The Supreme Court said:

> "Founded on physical power, *McDonald v. Mabee*, 243 U.S. 90, 91 37 S.Ct. 343, 61 L.Ed. 608, in rem jurisdiction of a state court is limited by extent of its power and by the coordinate authority of sister States.

> The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state . . ."
>
> "The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will."

The Supreme Court in Hanson determined the issue of in rem jurisdiction as follows:

> "The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction in rem."

Also pertinent is the rationale of *Fall v. Eastin, supra,* where the Court held that one of the reasons the Nebraska court properly refused to give effect to the Washington decree was that, under Nebraska law (as in Pennsylvania), property rights cannot be determined in a divorce proceeding. See the language, quoted supra, at pages 9, 10.

CONCLUSION

For the foregoing reasons, it is urged that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Caption Omitted in Printing)

FINAL JUDGMENT DISSOLVING MARRIAGE

This action was heard before the Court. It was originally instituted by the Wife, as Plaintiff, on December 27, 1968, by the filing of a Complaint for divorce, alimony, custody of the minor children of the parties and the right to exclusive possession of the home of the parties, owned by them as tenants by the entireties. Her action was based upon an allegation of cruelty and temper. The Husband filed his Answer to the Complaint on January 14, 1969. Shortly thereafter the parties reconciled and resumed cohabitation for almost a year, until December 5, 1969, when the Wife, through new counsel, activated the proceedings.

On April 14, 1970, the Husband, pursuant to authority granted by the Court, filed a Counter-claim against the Wife alleging her adultery, cruelty and temper. That Counter-claim sought divorce and custody of the minor children and the sale of the home which was owned by the parties as a tenancy by the entireties. The Husband also pleaded condonation and reconciliation as affirmative defenses.

On May 1, 1970 the Wife filed her Answer to the Counter-claim. Thereafter on September 21, 1970 the Wife's Complaint for divorce, alimony and custody of the children was dismissed with prejudice, and that dismissal with prejudice was reiterated by Order dated October 9, 1970, but leave was granted to the Wife to file a supplemental complaint, alleging facts occurring subsequent to the reconciliation of the parties.

On October 12, 1970 the Wife filed an Amended and Supplemental Complaint, through new counsel, in which she sought a divorce, alimony, custody of the two minor children of the marriage and adjudication of her claim of property rights in various real properties and shopping centers in and around the City of Philadelphia, Pa. The Husband filed his Answer to that Amended And Supplemental Complaint in November, 1970.

On November 22, 1971, the Husband's Counter-claim was amended by adding to the prayer for relief a prayer that the Court determine the rights and interests of the parties in and to their real and personal property and that a partition of the real property located in Bay Harbor Island, Dade County, Florida, owned by them as a tenancy by the entireties, and the personal property contained therein, be adjudged.

On November 29, 1971, being 8 days before the date set for trial of the cause, the Wife, through new counsel, obtained an Order dismissing her Amended and Supplemental Complaint, and every count thereof, at her instance. That Order specifically preserved for adjudication the issues raised by Husband's counter-claim. In substitution of that dismissed Amended and Supplemental Complaint, the Wife then filed a Second Amended Complaint for Separate Maintenance, seeking permanent alimony without divorce, custody of the children and allowance for their support. Husband filed his Answer thereto. The action then proceeded to trial (with new counsel for the Wife), upon the Husband's dissolution of marriage) custody of the children, adjudication of the rights and interests of the parties in and to their real and personal property and partition of the Bay Harbor Island home and the personal property contained therein, and the Wife's prayer for separate maintenance and custody of the children. The action was tried on December 7, 1971 and continued on February 3 and 4, 1972. The Court heard and considered the testimony of the parties and their witnesses, and the exhibits received in evidence, and due consideration having been had, makes the following FINDINGS OF FACT:

1. This Court has jurisdiction of the subject matter and of the parties hereto.

2. *Both the Husband and Wife are permanent bona fide residents of the State of Florida, domiciled therein, and have resided in the State of Florida for more than 6 months before the filing of the pleadings herein.*

3. The marriage of the Husband, Charles Simon, and the Wife, Sally Simon, is irretrievably broken.

4. There are two minor children of the parties of whom Marla Simon, who is 15 years of age, resides with the Husband and Sheryl Simon, who is 4 years of age, resides with the Wife. The best interests of the children warrant the present continuation of the status quo with Marla remaining in the care, custody and control of the Husband and Sheryl remaining in the care, custody and control of the Wife, but with reasonable and liberal visitation afforded both parties to and with both children.

5. The parties own jointly, as tenants by the entireties, a home located in Bay Harbor Island, Dade County, Florida, the legal description of which is: Lot 34 and East ½ of Lot 35 in Block 23 of BAY HARBOR ISLAND, according to the Plat thereof as recorded in Plat Book 46 at Page 5 of the Public Records of Dade County, Florida, which is valued in excess of $200,000.00 subject to a mortgage having an approximate balance of $35,000.00. The furniture, furnishings and fixtures and equipment of that home are similarly owned by the parties as tenants by the entireties. In addition to his interest in that residence, and its contents, the Husband is the owner of a number of properties consisting of improved and unimproved real estate in Philadelphia, Pa., as designated and legally described in Plaintiff's Exhibit 1* filed in evidence, which was stipulated to have a net value in excess of $1,000,000.00. The Husband's income tax returns indicate actual income therefrom in excess of $20,000.00 after deducting depreciation. The testimony further showed that the properties are producing a gross "throw-off" of about $120,000.00 per year. Husband has been using the major portion of this sum to provide for himself and his family for the past 10 years.

6. The home of the parties is excessively large and costly to maintain for the occupancy of the Wife and the

4 year old child alone. It was originally purchased and used by the parties for occupancy of their family of eight, as it consisted at that time. The said property is indivisible and is not subject to physical partition without prejudice to the parties. Upon entry of this Final Judgment of Dissolution of Marriage their interest in that property will become that of equal tenants in common therein and the Husband entitled to partition thereof as prayed for in his counter-claim.

Whereupon, it is ORDERED, ADJUDGED and DECREED as follows:

1. The marriage of the parties hereto, to wit: Charles Simon and Sally Simon, is dissolve a vinculo because it is irretrievably broken.

2. (a) The custody of the minor child, Marla Simon, is awarded to the Husband, Charles Simon. The Wife, Sally Simon, shall have the right of reasonable visitation with Marla including the right to have Marla visit with the Wife, over weekends and holidays.

(b) The custody of the minor child, Sheryl Simon, is awarded to the Wife, Sally Simon. The Husband, Charles Simon, shall have the right of reasonable visitation with Sheryl Simon including the right to have Sheryl visit with the Husband, over weekends and holidays.

(c) Visitation by either parent with the child at or away from the home of the other parent, or by the child to the other parent for weekends or holidays shall be liberal and encouraged by both parents.

3. The Husband, Charles Simon, shall pay $1,250.00, per month to the Wife, Sally Simon, as alimony, commencing April 1, 1972 and on the first day of each and every month thereafter.

4. The Husband, Charles Simon, shall pay $325.00, per month as child support for Sheryl Simon, the minor child of the parties, commencing April 1, 1972 and on the

1st day of each and every month thereafter. In addition thereto the Husband shall pay the reasonable cost of her education.

5. (a) That the home of the parties and the furniture, furnishings and fixtures and equipment contained therein, located at 10330 W. Broadview Drive, Bay Harbor Island, Dade County, Florida, which is legally described as:

> Lot 34 and East ½ of Lot 35 in Block 23 of BAY HARBOR ISLAND, according to the Plat thereof recorded in Plat Book 46 at Page 5 of the Public Records of Dade County, Florida.

shall be sold by the parties as soon as possible after April 1, 1972, and the net proceeds of the sale shall be divided equally between the parties except that any balance remaining due on the mortgage encumbering that property shall be paid by the Husband.

(b) If the parties do not succeed in effecting such voluntary sale by October 1, 1972, then upon motion and affidavit of either party showing that said sale has not been made within the time limited, a supplemental judgment shall be entered herein directing the Clerk of the Court to sell the said property at public sale on a specified day, not less than 10 nor more than 30 days thereafter, to the highest bidder in cash, except as hereinafter set forth, at the South Door of the Courthouse in Dade County, Florida, in accordance with §45.031, Florida Statutes.

(c) The Husband, Charles Simon, shall advance all subsequent costs of this action and shall be reimbursed for them by the Clerk if he is not the purchaser of the property at the sale. If the Husband is the purchaser, the Clerk shall credit the Husband's bid with 50% of the costs advanced by him or thereafter accruing and with 50% of the total amount of his bid, except that any balance due on a mortgage encumbering said property shall be paid by the Husband or charged against his share of the pro-

ceeds of the sale. If the Wife is the Purchaser, the Clerk shall credit the Wife's bid with 50% of the amount of her bid.

(d) On filing a Certificate of Title the Clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying:

(1) All costs advanced by the Husband in connection with the sale;
(2) Documentary stamps affixed to the Certificate;
(3) 50% of the net proceeds of the sale shall be paid to the Wife, without charging her share for the balance due on any mortgage encumbering the property;
(4) The remaining 50% of the net proceeds of the sale, minus such amount as is due for payment of any outstanding mortgage encumberance on the property, shall be paid to the Husband;
(5) The balance due on such mortgage as may encumber the property shall be paid and satisfied.

It is the intent of this paragraph that the Husband shall be charged with the obligation to pay off any balance due under the mortgage encumbering the property, with all costs of the sale to be borne equally by the parties and that the net proceeds of the sale, after satisfying the mortgage indebtedness by the Husband, shall be divided equally between the parties.

(e) On filing the Certificate of Title the purchaser at the sale shall be let into possession of the property.

(f) Jurisdiction of this action is retained to enter such further Orders or supplemental judgments as are proper or necessary to effectuate the partition of said property, including, without limitation, supplemental judgment of partition and Writs of Assistance.

6. Attorneys, Stephen Butter, Esq., 420 Lincoln Road, Miami Beach, Florida, 33139, William John Mason, Esq.,

450 Seybold Building, Miami, Florida, 33132 and S. Blair Ross of 1497 N.W. 7th Street, Miami, Florida, 33125, are given notice hereby that any application that they may see fit to make with respect to claim by them, or any of them for counsel fees in this cause shall be submitted to this Court in writing on or before April 15, 1972. The original of such application shall be submitted by mailing the same to Honorable Major B. Harding, Circuit Court Judge, 200 Duval County Courthouse, Jacksonville, Florida, and mailing a copy of such application to the Husband's attorney, Jack D. Burris, Esq., 420 Lincoln Road, Miami Beach, Florida, 33139. The Husband shall have 10 days after receipt of such application to file a written response thereto. Jurisdiction of this action is retained to enter such further Orders or supplemental judgments as are proper or necessary to adjudicate the claims for attorneys' fees, if any, so filed by said attorneys, and the pending claim, heretofore submitted and pending herein by Richard L. Lapidus, Esq.

7. The Wife's Second Amended Complaint for Separate Maintenance be and it is hereby dismissed.

8. This Court retains jurisdiction of this cause for the purpose of making such further Orders with respect to the care, custody and support of the minor children of the parties as, from time to time, will seem proper in equity and good conscience.

DONE AND ORDERED in Chambers at the Court House, at Jacksonville, Duval County, Florida, this 20th day of March, 1972.

/s/ Major B. Harding
Circuit Judge

(Caption Omitted in Printing)

ORDER ON MOTION TO DISMISS

The Plaintiff seeks to enjoin the Defendant from proceeding in certain actions in the courts of Pennsylvania relative to the property rights of the parties in certain property allegedly owned by the Plaintiff in the State of Pennsylvania. The parties were at one time married and their marriage was dissolved in the Circuit Court in and for the Eleventh Judicial Circuit, in and for Dade County, Florida, case number 68-19724.

In the dissolution proceeding the husband, (Plaintiff here), sought to have property rights of the parties to the Pennsylvania property litigated and made a part of the final judgment of dissolution of marriage. These efforts were resisted by the wife, (Defendant here), and the court, by order refusing to permit the amendment to pleading for not being timely filed, permitted and directed the matter to proceed without an adjudication thereof in the final judgment. Both parties, here and there, were well aware that failure to adjudicate these property rights in a final judgment dissolving a marriage might bring into effect an adjudication thereof by operation of law.

In said dissolution action, the undersigned having rendered said judgment, the Pennsylvania property for the purposes of the dissolution was conceded to be in the name of the husband, (Plaintiff here). It was also known to the court that there was, as alleged in the Plaintiff's complaint in the instant cause, pending the actions in the Pennsylvania courts relative to the interests of the parties therein.

The court, in the dissolution action, did not have the property rights of the parties to the property in Pennsylvania before it as an issue to be determined by final judgment. Therefore, the final judgment did not adjudicate those property rights except as they may be adjudicated by operation of law. The court, upon the evidence, did

consider the husband assets in determining in alimony and child support to be paid by the husband.

Inasmuch as the ownership or property rights of the parties was the subject of actions pending in the Pennsylvania courts at the time of the final judgment of dissolution of marriage hereinabove referred to, this court does not deem it appropriate to determine whether said judgment divested the Pennsylvania court of its jurisdiction or otherwise acted as a bar to further proceedings there.

This court does have jurisdiction over the parties to determine whether an injunction should lie against the Defendant for, maliciously, for the purpose of vexing and harrassing the Plaintiff, prosecuting the actions in the courts of Pennsylvania and to and for that purpose, the court finds the Plaintiff's complaint states a cause of action.

Therefore, it is

ORDERED:

1. The Defendant's motion to dismiss the Plaintiff's complaint is denied.

2. Consistent with the findings hereinabove set forth, the court, on its own motion, strikes the following from the Plaintiff's complaint:

a. That portion of paragraph 5 which reads:

"A true copy of Plaintiff's Exhibit 1 filed in evidence, containing the legal description of the properties in Philadelphia, Pennsylvania, which were found and determined in said Final Judgment to be owned by Plaintiff, Charles Simon, (Plaintiff's Exhibit 1 was incorporated into the Final Judgment by reference) is attached hereto and marked Exhibit C."

b. Paragraph 6.

c. That portion of paragraph 8 which reads:

"which were adjudicated and concluded in the Final Judgment Dissolving Marriage entered on March 20, 1972, in the Circuit Court of Dade County, Florida."

d. Paragraph 10.

e. Paragraph 12.

3. The Defendant shall have 15 days from the date hereof to file her answer to the Plaintiff's complaint as amended.

4. The parties shall file the original of all pleadings with the Clerk of the Court and send copies thereof to the undersigned.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 16th day of October, A.D., 1973.

/s/ Major B. Harding
Judge

Copies: Jack D. Burris, Esquire
Attorney for the Plaintiff
420 Lincoln Road
Miami Beach, Florida 33139

Frank, Strelkow & Gay, Esquires

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1974 Case No. 73-1360

CHARLES SIMON, *Appellant*

vs.

SALLY SIMON, *Appellee*

Opinion filed April 2, 1974.

An Interlocutory Appeal from the Circuit Court for Dade County, General Jurisdiction Division, Major B. Harding, Judge.

Jack D. Burris, for appellant.

Frank, Strelkow & Gay and Richard N. Krinzman, for appellee.

Before BARKDULL, C.J., and HENDRY and HAVERFIELD, JJ.

PER CURIAM.

Plaintiff-appellant takes this interlocutory appeal to review an order by which the court on its own motion struck certain portions from plaintiff's complaint. We reverse.

On March 20, 1972 the chancellor entered a judgment dissolving the marriage between the parties. Contained therein was a specific finding of the court that the parties owned jointly as tenants by the entireties, the marital residence and, in addition, that the appellant, ex-husband, owned a number of properties consisting of improved and unimproved real estate in Philadelphia, Pa. which was

stipulated to have a net value in excess of $1,000,000 and from which appellant's actual income was in excess of $20,000 after deducting depreciation, a major portion of which appellant used to provide for his family. Thereupon, the chancellor ordered that the marital residence be sold and the proceeds from the sale thereof be divided equally between the parties, and that appellant pay monthly alimony to the appellee, ex-wife, and monthly child support. No appeal was taken from this judgment. Subsequent thereto, plaintiff-appellant filed a complaint in which he sought an injunction to enjoin his ex-wife, the defendant-appellee, from prosecuting seven separate actions involving his real property holdings in the Court of Common Pleas of Philadelphia County, Pennsylvania. Appellant alleged therein that the chancellor in the dissolution judgment made a finding of fact and an adjudication of property rights whereby appellant was found and determined to be the owner of the Philadelphia real property and as a result thereof, all property rights between him and his ex-wife finally have been determined and adjudicated; therefore, defendant-appellee is precluded and barred from claiming any special equities or other claim with respect to his Philadelphia real estate. In response thereto, defendant-appellee filed a motion to dismiss which was denied. However, the court on its own motion struck from the complaint portions of paragraphs 5 and 8 and paragraphs 6, 10 and 12 in their entirety which alleged that the final judgment of dissolution constituted a final adjudication of the property rights between the parties and barred any further litigation thereof by the defendant. Plaintiff appeals therefrom.

The rule is firmly established that as in the case sub judice where the court has acquired jurisdiction to adjudicate property rights, a final dissolution of marriage judgment settles all property rights of the parties and bars any action thereafter by either party to determine property rights. Finston v. Finston, 160 Fla. 935, 37 So.2d 423

(1948); Smith v. Bollinger, Fla.App. 1962, 137 So.2d 881; Jones v. Jones, Fla.App. 1962, 140 So.2d 318; McEachin v. McEachin, Fla.App. 1963, 154 So.2d 894; Thompson v. Thompson, Fla.App. 1969, 223 So.2d 95; Henderson v. Henderson, Fla.App. 1969, 226 So.2d 699; Vandervoort v. Vandervoort, Fla.App. 1973, 277 So.2d 43. In addition, property claims must be put into issue in the dissolution of marriage action since the doctrine of res judicata is applicable even where property rights are not put into issue, if the issue could have been raised. Finston, *supra;* Cooper v. Cooper, Fla. 1954, 69 So.2d 881.

After a close reading of the final judgment of dissolution, it is clear that the property rights of the parties conclusively were determined and settled therein. It is equally clear that the amount of alimony awarded the defendant-appellee, ex-wife, was predicated upon the court's finding that appellant owned the Philadelphia properties and the annual income he derived therefrom. Thus, we reverse the order striking the portions of appellant's complaint cited hereinabove and remand the cause for further proceedings not inconsistent herewith.

It is so ordered.

(Caption Omitted in Printing)

SUMMARY FINAL JUDGMENT FOR PLAINTIFF

This cause came on to be heard on Motion of Plaintiff, CHARLES SIMON, for Summary Final Judgment in the above case, upon the pleadings filed herein by Plaintiff and Defendant, the Affidavit of Charles Simon attached to the Motion, and Exhibits thereto and upon the Opinion and Order of the District Court of Appeal of Florida, Third District, which was rendered April 2, 1974, on an Interlocutory Appeal taken in this cause, and due consideration having been had,

The Court finds:

1. That the District Court of Appeal of Florida, Third District, has specifically ruled and adjudicated that all property rights of the parties in this cause were conclusively determined and settled in the Final Judgment Dissolving Marriage which was entered by this Court on March 20, 1972. That opinion of the District Court of Appeal specifically held that the Final Judgment Dissolving Marriage of the parties, aforesaid, was a bar to the seven actions described in Plaintiff's complaint, instituted by Defendant herein, against Plaintiff herein, in the Courts of the State of Pennsylvania, in which she claimed special equities and other property rights in the separate property of the Plaintiff herein, located in that State. The District Court of Appeal thereupon reversed the Order of this Court striking portions of the complaint and reinstated the Plaintiff's allegation alleging a bar and res judicata and remanded this cause for further proceedings not inconsistent with its order.

2. The affidavit filed in opposition to the Motion for Summary Judgment is insufficient to be considered by the Court.

3. The entry of this judgment is consistent with the Mandate of the Third District Court of Appeal.

4. There is no genuine issue as to any material fact in this cause and Plaintiff is entitled to a judgment as a matter of law.

WHEREUPON, it is ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Summary Final Judgment be and it is hereby granted.

2. Defendant, SALLY SIMON, her agents and attorneys, be and they are individually and severally permanently enjoined from prosecuting against the Plaintiff, CHARLES SIMON, any and all actions now pending in the Court of Common Pleas, Philadelphia County, State of Pennsylvania, or in any other Court of that state or in any other state, claiming or attempting to claim or assert any special equity or property interest in the real or personal property of the Plaintiff, CHARLES SIMON, located in the State of Pennsylvania, or elsewhere, where such claim is predicated upon facts or circumstances which existed on or before March 20, 1972, the date on which the Final Judgment dissolving the marriage of the parties hereto was entered; and it is further

3. ORDERED AND ADJUDGED that Defendant, SALLY SIMON, be and she is hereby ordered and directed forthwith to cause, as to the Plaintiff, CHARLES SIMON, the dismissal with prejudice of all actions now pending against him in the Court of Common Pleas of Philadelphia County, State of Pennsylvania, wherein she is Plaintiff and wherein she claims or asserts any special equity or property right in real or personal property, now or heretofore owned by Plaintiff, CHARLES SIMON, in the State of Pennsylvania or elsewhere; and it is further

4. ORDERED AND ADJUDGED that the Defendant, SALLY SIMON, shall file in this cause and serve upon Plaintiff's counsel, proof of the dismissal of all actions herein required to be dismissed by her within 30 days from this date.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 24th day of October, A.D. 1974.

/s/ Major B. Harding
Circuit Judge

Copies: Jack D. Burris, Esquire
420 Lincoln Road
Miami Beach, Florida 33139

Daniel Neal Heller, Esquire
Suite 1205 Ainsley Building
14 N.E. 1st Avenue
Miami, Florida 33132

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

July Term, A.D. 1975 Case No. 74-1692

SALLY SIMON, *Appellant*

vs.

CHARLES SIMON, *Appellee*

Opinion filed July 29, 1975.

An Appeal from the Circuit Court for Dade County, Major B. Harding, Judge.

Heller & Kaplan, for appellant.

Jack D. Burris, for appellee.

Before PEARSON, HENDRY AND HAVERFIELD, JJ.

PER CURIAM.

The defendant, Sally Simon, appeals a summary final judgment which enjoined her from proceeding with actions against her former husband, Charles Simon, in the courts of the State of Pennsylvania. The trial judge correctly determined that under the facts before him upon the pleadings and affidavits submitted and the law of the case as established in Simon v. Simon, Fla.App. 1974, 293 So.2d 780, the plaintiff was entitled to the injunction sought.

Affirmed.

September 11, 1975

A18

(Caption Omitted in Printing)

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

/s/
Clerk, District Court of
Appeal, Third District

cc: Heller & Kaplan
Jack D. Burris

/h

(The Mandate in the Above Styled Cause Has Today Been Issued and Mailed to the Clerk of the Circuit Court in and for Dade County, Florida)

March 10, 1976

A19

(Caption Omitted in Printing)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, Acting Chief Justice, BOYD, SUNDBERG and HATCHETT, JJ., Concur
ADKINS, J., Dissents

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court

TC

cc: Hon. William P. Carter, Clerk
Hon. Major B. Harding, Judge
Hon. Richard P. Drinker, Clerk
Lynn Richard Mattaway, Esq.
of HELLER & KAPLAN
Jack D. Burris, Esq.

Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976

No. 75-1733

SALLY LEE SIMON,

Petitioner,

vs.

CHARLES SIMON,

Respondent.

RESPONDENT'S BRIEF

Of Counsel
MEEHAN & STOELKER
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Philadelphia, Pa. 19102

JACK D. BURRIS
Attorney for Respondent
420 Lincoln Road
Miami Beach, Fla. 33139

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in the

Supreme Court

of the

United States

October Term, 1976

No. 75-1733

SALLY LEE SIMON,

Petitioner,

vs.

CHARLES SIMON,

Respondent.

RESPONDENT'S BRIEF

INTRODUCTION

CORRECTION OF PETITIONER'S FACTUAL STATEMENTS

Respondent is placed in the regrettable position of being compelled to state that a number of factual statements contained in the Petition for Writ of Certiorari and in the body of the Petitioner filed herein are inaccurate, distorted or completely dehors the record. For example, citing the pages of the Petition:

1. Page 3, first paragraph: There is no evidentiary support, either in the record submitted with the Petition, nor in any proceeding in the lower courts, for the statement that Pennsylvania courts would not accord full faith and credit to the Florida injuction, nor is there any legal precedent or authority cited to sustain that assertion.

2. Page 3, second paragraph: There is no support in the record submitted with the Petition, nor in any proceeding in the lower courts, for the statement that the Pennsylvania property owned by Respondent is valued in excess of $4,000,000.00, with annual income in excess of $400,000.00. [The only pertinent allegation is contained in the Final Judgment Dissolving Marriage (at A3)], wherein a Finding of Fact was specifically made in the divorce judgment that:

> "... the husband is the owner of ... real estate in Philadelphia, Pennsylvania ... which was stipulated to have a net value in excess of $1,000,000.00. The ... tax returns indicate actual income therefrom in excess of $20,000.00 after deducting depreciation. The testimony further established that the properties are producing a gross 'throw-off' of about $120,000.00 per year."

3. Page 3, second paragraph and at Page 10, last line:

There is no support, either by the way of initial allegation or evidence in support thereof, either in the record submitted with the Petition, or in any proceeding in the lower courts, for the statement that the Petitioner's signatures on certain deeds were forged.

There is nothing in the record to suggest the verity of this allegation. No testimony or documentation of any kind was offered to support such a contention at any phase of this case.

The Pennsylvania litigation, which was enjoined by the Florida court, does not allege fraud or forgery in any case. Those Pennsylvania cases involve deeds which were executed by the parties in 1965, 1966 and 1969, prior to the trial of their divorce action in February, 1972. Those deeds were signed by both parties and transferred properties from the husband and wife to the husband. The complaints in the Pennsylvania cases make only the following allegations with respect to those deeds:

> Case No. 410:
>
> "Plaintiff has no knowledge or awareness of ever having executed a deed with her husband conveying the aforesaid ... parcels."

Case No. 3508:

"The signature on the deed purporting to be that of the Plaintiff does not appear to be in her writing."

Case No. 4056:

"Plaintiff did not receive consideration for a conveyance of land transferred in April, 1965."

Case No. 4136:

"There was no consideration of any kind passing from husband to wife . . . nor does it appear that the signature of 'Sally Lee Simon' is in the handwriting of the wife."

Case No. 4355:

"There was a total absence of consideration passing to the wife from the husband."

The foregoing quotations are taken from certified copies of the Pennsylvania complaints which were admitted in evidence and form part of the record in the lower court proceedings which ended in the Judgment of Injunction. No evidence was submitted in the Injunction action to support those allegations. There was certainly no allegation or evidence of forgery.

4. Page 3, fourth paragraph: The allegations at the bottom of page 3 of the Petition reciting proceedings which are purported to have taken place in the Pennsylvania

courts with respect to the Pennsylvania litigation is completely dehors the record. None of those facts have ever been presented to the Florida courts. None of those allegations are supported by anything in the record presented to this Court.

5. Page 4, paragraphs three and four: The record contradicts Petitioner's statement that the Florida divorce judgment adjudicated only the Florida real estate owned by the parties.

The Final Judgment Dissolving Marriage positively adjudicated, and made a specific Finding of Fact that:

> "In addition to his interest in that residence, and its contents, the husband is the owner of a number of properties consisting of improved and unimproved real estate in Philadelphia, Pa., as designated and legally described in Plaintiff's Exhibit 1 filed in evidence, which was stipulated to have a net value in excess of $1,000,000.00." [A3]

No appeal was taken from that Judgment of Divorce.

Furthermore, the divorce action did not "proceed to final judgment without an adjudication of those property rights." That Final Judgment Dissolving Marriage recited all the proceedings taken in that action up to judgment. [A1-2] That recitation by the court in the Final Judgment Dissolving Marriage establishes:

> (a) On October 12, 1970, the wife (Petitioner here) filed an amended complaint for divorce, in which she specifically sought "adjudication

of her claim of property rights in various real properties and shopping centers in and around the City of Philadelphia, Pa." [A1, last paragraph]

(b) On November 22, 1971, the husband's (Respondent here) counterclaim for divorce was amended "by adding to the prayer for relief a prayer that the court determine the rights and interests of the parties in and to their real and personal property . . . " [A2-top paragraph]

(c) "On November 29, 1971, being 8 days before the date set for trial of the cause, the wife, . . . obtained an Order dismissing her Amended and Supplemental Complaint, and every count thereof, at her instance. That Order specifically preserved for adjudication the issues raised by husband's counterclaim". [A2 - 2nd paragraph]

(d) "The action then proceeded to trial . . . upon the husband's action for divorce . . . [and] adjudication of the rights and interests of the parties in and to their real and personal property . . . " [A2, 2nd paragraph].

The record clearly establishes, from the recitation of the Final Judgment of Divorce above noted, that on the very eve of trial the wife attempted to withdraw from the Florida court her attempt to establish a special equity or interest in the Pennsylvania property which was then owned solely by the husband, and on the very eve of the Florida trial she filed parallel complaints against that Pennsylvania real estate in the Pennsylvania courts.

The sworn Complaint for Injunction, filed by Respondent, which culminated in the Final Judgment of Injunction here on review, alleged in detail acts of extreme malice in connection with that Pennsylvania litigation, in which Petitioner's Philadelphia attorney caused attachment to issue against all of Respondent's bank accounts and construction mortgage and other loan accounts with the "stated intention of completely disrupting Charles Simon's business operations in Philadelphia and thereby 'bring him to his knees' ". Petitioner's actions included letters by Petitioner's counsel to all of the tenants of Respondent's shopping center properties in Philadelphia directing them to withhold payment of their rents. Those allegations of Respondent's sworn complaint in the Injunction action were never controverted by any admissible evidence from Petitioner.

The Pennsylvania actions were obviously instituted on the very eve of the Florida divorce trial for the purpose of whipping Respondent into submission to settlement.

But those Pennsylvania actions did not withdraw from the Florida court its jurisdiction to determine and adjudicate the property rights of the parties between themselves in the divorce case which was still before it, despite Petitioner's attempt to divert that question to Pennsylvania.

Petitioner was expressly warned in the divorce trial that if she refused to submit any evidence of her claim to the court at that time, she was proceeding at her peril and risked an adverse ruling on the question of property rights.

The Trial Judge specifically noted in his Order dated October 16, 1973, in this Injunction case, [A8]:

(1) "Both parties, here and there, were well aware that failure to adjudicate these property rights in a final judgment dissolving a marriage might bring into effect an adjudication thereof by operation of law" ' and

(2) "In said dissolution action, the undersigned having rendered said judgment, the Pennsylvania property for the purpose of the dissolution was conceded to be in the name of the husband. (Plaintiff here); and

(3) "The court, upon the evidence, did consider the husband's assets in determining alimony and child support to be paid by the husband." [A8-9]

6. Page 6, first paragraph: The bare allegation is made:

"The issues involved here were raised in the Florida proceedings."

No support or reference in support of this statement is given, in direct contravention of Supreme Court Rule 23 subd. 1 (f) which specifically requires the Statement of the Case to:

"... specify the stage in the proceedings in the court of first instance and in the Appellate Court, at which, and the manner in which, the federal

questions sought to be reviewed were raised, the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court ... with specific reference to the places in the record where the matter appears ... as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on Writ of Certiorari."

No such reference is made, nor can it be made, because neither the Appellate Court nor the court of first instance in the Florida litigation were ever advised that:

"... the validity of a treaty or statute of the United States is drawn in question or ... the validity by a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or ... any title, right, privilege or immunity as specially set up or the claim under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

as provided in Title 28, U.S. Code §1257 (3), which establishes and limits the Certiorari jurisdiction of this Court.

SUMMARY OF RESPONDENT'S ARGUMENT

1. The Petition for Writ of Certiorari should be dismissed because this case was finally and fully adjudicated by the highest court of the State of Florida in which a decision can be had, i.e., the District Court of Appeal of Florida, Third District, on July 29, 1975, and Rehearing thereafter was denied by that court on September 11, 1975.

The period of 90 days which within which to file Petition for Certiorari to this Court commenced to run from September 11, 1975. The Petition was not in fact filed with this Court until June 18, 1976, approximately nine months after the final rendition by the highest court in the State of Florida having jurisdiction over this matter.

The Petition for Writ of Certiorari filed to the Florida Supreme Court was an empty gesture because that court had no jurisdiction to review the District Court of Appeal and, in fact, dismissed that Petition for Certiorari for want of jurisdiction.

2. The Petition for Writ of Certiorari should be dismissed because it is apparent that no rule or substantial federal question exists in this case.

This case involves an injunction directed by the Florida court against its own citizens restraining one citizen of the State of Florida from suing another citizen of the State of Florida in the courts of another state upon matters which had been previously litigated and determined in a divorce action between those same parties rendered by a Florida court.

There is no question of full faith and credit involved because it is only one judgment of the State of Florida, which is being locally enforced within that state, which is before this court.

3. The Petition for Writ of Certiorari in this case should be denied because it is long established by the decisions of this court, including the case of *Fall vs. Easton*, 215 U.S. 1, 30 S.Ct. 3, upon which Petitioner erroneously relies, that the Florida court, acting in personam, may adjudicate the rights of parties before it, even though such rights relate to lands in another state.

Such decision is binding upon the parties and will be res judicata in all future litigation between them.

ARGUMENT

POINT I

THE PETITION FOR WRIT OF CERTIORARI HEREIN SHOULD BE DISMISSED BECAUSE IT WAS NOT TIMELY FILED.

The Petition for Writ of Certiorari filed herein seeks review of a Summary Judgment of Injunction, dated October 24, 1974, entered by the Circuit Court of Dade County, Florida, enjoining Petitioner from prosecuting seven actions filed by her against Respondent in Common Pleas Court of Philadelphia County, Pennsylvania, seeking a determination of property rights between the parties in real property owned by Respondent in Pennsylvania. The Injunction was issued upon the ground that the parties were citizens of the Florida court, over whom it had in personam jurisdiction, and that all property rights of the parties were conclusively determined and settled between them, under Florida law, as a result of a Final Judgment Dissolving their marriage which was entered in Florida on March 20, 1972.

That Final Judgment of Injunction was appealed to the District Court of Appeal of Florida, Third District, and was affirmed by that court on July 29, 1975 [A-17]. Petition for Rehearing was denied on September 11, 1975. [A18]. That judgment of affirmance by the District Court of Appeal of Florida, rendered on July 29, 1975, on which rehearing was denied on September 11, 1975, was rendered by the highest court of the state in which a decision can be had, as required by 28 U.S.C. §1257.

Petitioner was allowed 90 days after September 11, 1975, within which to file the Petition for Writ of Certiorari to this Court. That time expired on December 10, 1975. The Petition herein was not filed until May 28, 1976 and is therefore not timely filed.

The District Court of Appeal of Florida is the highest court of the State of Florida in which a decision can be had in this case. Review of decisions of the District Courts of Appeal of Florida are strictly limited. Beyond those specific cases announced in Article 5, §3 of the Florida Constitution, the Supreme Court of Florida has no jurisdiction to review decisions of lower courts, including the District Court of Appeal. *Ansin v. Thurston*, (Fla. 1958) 101 So.2d 808; *Mancini v. State*, (Fla. 1975) 312 So.2d 732.

This Court has recognized the limited jurisdiction of the Florida Supreme Court with respect to decisions of the District Courts of Appeal of Florida in:

> *Nash vs. Florida Industrial Commission, Fla.* 1967, 389 U.S. 235, 237, 88 S.Ct, 362, 365.

In *Nash vs. Florida Industrial Commission*, supra, this Court ruled:

> "The Florida Supreme Court seems to have decided that it lacks jurisdiction by appeal to consider per curiam denials of certiorari by the Florida District Court of Appeal. Callendar v. State, Fla., 181 So. 2d 529. *** Thus, it is impossible for us to say that under Florida law petitioner here had any right to call upon the State Supreme Court for review. In these circumstan-

ces, we therefor are unable to say that the District Court of Appeal was not the highest court in Florida wherein a decision could be had as required by 28 U.S.C. §1257(3)."

In *Gorman vs. Washington University*, 316 U.S. 98, 62 S.Ct. 962, this Court dismissed a Petition for Writ of Certiorari, for lack of jurisdiction, stating, inter alia:

"Hence it is the last state tribunal—here the court en banc—to which the cause could be brought for review which is the "highest court of a State in which a decision could be had" within the meaning of the jurisdictional statute, regardless of the particular description or designation which may be applied to it by state statutes.

[4] Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction."

In *Department of Banking vs. Pink*, 317 U.S. 264, 63 S.Ct. 233, this Court denied Petition for Certiorari, for want of jurisdiction, on the ground that it was not filed within the time provided by law. This Court ruled:

"For the purpose of the finality which is prerequisite to a review by this Court, the test is . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court. See Gorman v. Washington University, 316 U.S. 98, 62 S.Ct. 962, 86

L.Ed. 1300. Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

When the District Court of Appeal of Florida affirmed the Summary Judgment of Injunction, thereafter denied rehearing and returned the mandate to the lower court, this case had been finally determined in the judicial system of the State of Florida. The Florida Supreme Court had no jurisdiction to review.

The Petition for Certiorari which was filed to the Florida Supreme Court and was denied by it on the ground that that court was without jurisdiction [A-19] was a meaningless and empty gesture. It had no more substance or effect than if a Petition for Certiorari had been filed from the Florida judgment to the Court of Appeals of Alaska. The appellate process was ended on September 11, 1975 and the 90 day period allowed for Petition to this Court began to run from that date.

The Petition was obviously not timely filed and should be dismissed.

POINT II

THE PETITION FOR CERTIORARI SHOULD BE DISMISSED BECAUSE IT IS PATENT THAT NO REAL AND SUBSTANTIAL FEDERAL QUESTION EXISTS OR WAS DETERMINED BY THE FLORIDA COURT.

This Court, from the time of its foundation, has adhered to the principle that it will not review judgments of State courts which rest upon adequate and independent state grounds. This long-standing policy has been scrupulously observed in many decisions of this Court.

Neblett v. Carpenter, 305 U.S. 297,
59 S.Ct. 170
Reh. Den. 305 U.S. 675, 59 S.Ct. 335.

A real and substantial federal question is essential to the jurisdiction of this Court over judgments of State courts.

Abrams v. Van Schaick, 293 U.S. 188,
55 S.Ct. 135.

The Petition for Writ of Certiorari filed herein invokes jurisdiction of this Court pursuant to 28 U.S.C. §1257 (3). Neither the validity of a treaty or statute of the United States nor the validity of a State statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, is here involved. The basis of the Petition is therefore, necessarily founded on a claim that: "a title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes

of, commission held or authority exercised under, the United States."

The assertion made in the Petition which would have the vaguest reference to the foregoing is the assertion that the Florida judgment would not be given full faith and credit by the Pennsylvania court and is not entitled to recognition by the Pennsylvania court.

That assertion is not sufficient to confer jurisdiction upon this Court. No federal question is thereby presented.

The Florida judgment does not address itself to the Pennsylvania court. The Florida judgment does not purport to tell the Pennsylvania courts what or what not to do. The Florida judgment asserts itself directly against the person of the Petitioner, over whom the Florida court has in personam jurisdiction. It decrees that the property rights of the parties before it were fully and finally determined in their divorce action, rendered by the same Florida court, under Florida law, in that divorce decree, and that they were therefore barred from asserting any further claim or contention with respect to such property rights against each other.

We do not have here a case where the Pennsylvania court has rendered a judgment granting or denying full faith and credit to that Florida injunction. If that were the case, review of such a Pennsylvania judgment, upholding or denying the efficacy of the Florida judgment, would be a proper subject for review by this Court, under the full faith and credit clause of the Constitution.

But the Petition filed herein seeks review only of the Florida judgment per se. That judgment is a purely local

State judgment. Its acceptance or denial under the Constitution's provision for full faith and credit is not an issue. Its enforcement is purely local in scope and is directed against the person of the Petitioner, if she fails to comply with its directives. Under such situations there is nothing for this Court to review.

The validity or error in the weight given by a State court to one of its own judgments in one of its own courts, affecting its own citizens, has been categorically determined to be not the subject of review by this Court because no federal question is involved.

Phoenix Fire Ins. Co. vs. Tennessee, 1896,
161 U.S. 174, 16 S.Ct. 471,
40 L.Ed. 660.

In a case involving review of a Florida judgment, this Court said:

Argersinger v. Hamlin, Fla. 1972,
407 U.S. 25, 38, 92 S.Ct. 2006, 2013:

"We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement."

In a case somewhat relevant in fact to the instant case:

Hicks vs. Corbett, (Cal .1955)
278 P.2d 77,
U.S. Cert. Den. 349 U.S. 965
75 S.Ct. 898.

a Washington Court, in a prior action between the parties, had entered a judgment which included a Finding of Fact that the Plaintiff therein had "no claim, right, title or interest in either the King County [Washington] property or the Santa Barbara [California] property."

Following that judgment in Washington, the Plaintiff therein filed a new suit against the same defendant in California, claiming title to the land which the Washington court previously found he had no claim, right, title or interest in. The California court dismissed the complaint on the ground that the relief sought therein was barred by the previous Washington's court's judgment. The California court held:

"Thus, it is obvious that the subject matter of the Washington action was not the title to California real estate — it was not an in rem action concerning California property. The Washington action was an in personam action — the subject matter was the contract of exchang and the rights of the parties thereunder. Certainly the Washington Court had jurisdiction of the parties and of the contract".

Under the Full Faith and Credit clause of the U.S. Constitution, art. 4, §1, such a decree of the Washington court must bar a re-litigation of the parties' contractual rights in the California courts."

The significant note in the above case is the fact that this Court denied a Petition for Certiorari on that ruling, which is very close in fact and law to the factual situation in the instant case.

POINT III

THE FLORIDA COURT'S JUDGMENT OF DIVORCE WAS CONCLUSIVE ON THE QUESTION OF THE PROPERTY RIGHTS OF THE PARTIES THERETO, AND RES JUDICATA THEREOF; AND A SUBSEQUENT FLORIDA INJUNCTION AGAINST FURTHER LITIGATION IN ANOTHER STATE INVOLVING CLAIMS TO THOSE SAME PROPERTY RIGHTS IS PROPERLY ISSUED, WHERE THE FLORIDA COURT HAS IN PERSONAM JURISDICTION OF THE PARTIES.

The Final Judgment Dissolving Marriage [A-1] establishes:

(a) That the original action for divorce was instituted by Petitioner against Respondent and that Petitioner's action specifically included a demand for "adjudication of her claim of property rights in various real properties and shopping centers in and around the City of Philadelphia, Pa." [A-1]

This was a claim which was filed long prior to the institution of her subsequent litigation in Pennsylvania for the same relief.

(b) Respondent filed a counter-claim for divorce which likewise included a demand:

"That the court determine the rights and interests of the parties in and to their real and personal property." [A-2]

(c) Eight days before trial, on November 29, 1971, the Petitioner dismissed her complaint for divorce and demand for adjudication of her claim to the Pennsylvania property and substituted an action solely for separate maintenance. That Order of Dismissal, however, "specifically preserved for adjudication the issues raised by husband's counterclaim." Consequently, the question of property rights of the parties was definitely before the court at all times and never withdrawn. [A-2]

(d) The judgment contained specific FINDINGS OF FACT, which included:

"5. . . . in addition to his interest in that residence, and its contents, the husband is the owner of a number of properties consisting of improved and unimproved real estate in Philadelphia, Pa., as designated and legally described in Plaintiff's Exhibit 1 filed in evidence, which was stipulated to have a net value in excess of $1,000,000.00." [A-3]

(e) A substantial award of alimony was made to Petitioner. [A-5]

Following the entry of the judgment of divorce, Respondent filed an action for an injunction which is sub

judice. During intermediate proceedings in this action, the trial judge (who was the same judge as had rendered the original judgment dissolving marriage) made the following statement:

> "(a) Both parties, here and there, were well aware that failure to adjudicate these property rights in a final judgment dissolving a marriage might bring into effect an adjudication thereof by operation of law"; [A-8] and
>
> (b) In said dissolution action, the undersigned having rendered said judgment, the Pennsylvania property for the purpose of the dissolution was conceded to be in the name of the husband, (Plaintiff here); [A-8] and
>
> (c) The court, upon the evidence, did consider the husband's assets in determining alimony and child support to be paid by the husband." [A-8-9]

The District Court of Appeal of Florida, on Interlocutory Appeal in the injunction suit, rendered its opinion [A-11], wherein it established the law of the case which resulted in the summary judgment of injunction [A-14] which was thereafter rendered by the lower court and affirmed on appeal [A-17] by the District Court of Appeal.

In its opinion on Interlocutory Appeal the Florida District Court of Appeal made a specific determination:

> "After a close reading of the final judgment of dissolution, it is clear that the property rights

> of the parties conclusively were determined and settled therein. It is equally clear that the amount of alimony awarded the defendant-appellee, ex-wife, was predicated upon the court's finding that appellant owned the Philadelphia properties and the annual income he derived therefrom. Thus, we reverse the Order striking the portions of appellant's complaint cited hereinabove [the portions stricken were those which alleged that the judgment of divorce was res judicata on the question of property rights] and remand the case for further proceedings not inconsistent herewith." [A-13]

From the foregoing, it is clear that the District Court of Appeal actually predicated its decision, which was adopted by the lower court and reaffirmed by it on appeal, upon the fact that the final judgment of divorce on its face shows a specific Finding of Fact based on the evidence to the effect that all property rights of the parties had been conclusively determined and settled therein.

Certainly Findings of Fact in State courts are not subject to review by this Court.

Petitioner's premise of error is, basically, predicated upon a misinterpretation of *Fall vs. Easton*, 215 U.S. 1, 30 S.Ct. 3.

Fall vs. Easton, does not support Petitioner's contention that the injunction issued against Petitioner by the Florida court should be set aside and is not entitled to full faith and credit under Article IV §1 of the Constitution, as alleged at pages 11 and 12 of the Petition.

Fall vs. Easton is in the first instance, entirely compatible with the case sub judice, and in the second instance, is distinguishable from the case sub judice.

It is distinguishable because it involves facts which are quite distinguishable. Here we have a Florida divorce judgment, being enforced by a Florida Injunction decree rendered against Florida citizens over whom the Florida court has in personam jurisdiction. The fact that a claim of title to land in the State of Pennsylvania is involved is only incidental. No judgment of the Pennsylvania court concerning the Florida injunction is before this Court. No question of full faith and credit being given or denied the Florida judgment by the Pennsylvania court is under consideration. The Florida judgment does not force Florida's policy on the State of Pennsylvania. It is an in personam judgment directed to its own citizens, over whom it has in personam jurisdiction, and is being enforced within the State of Florida by the Florida court.

Fall vs. Easton, is quite a different case. The court specifically stated the question there to be:

> "The question in this case is whether a deed to land situate in Nebraska, made by a Commissioner under the decree of a court of the State of Washington, in an action for divorce, must be recognized in Nebraska under the due faith and credit clause of the Constitution of the United States."

The differences are at once apparent:

(a) A Washington court had actually caused a deed conveying Nebraska land to be executed and recorded in Nebraska; and

(b) It involved the refusal by the Courts of Nebraska to accord full faith and credit to the judgment and deed of conveyance issued by the Washington court.

Neither of the foregoing are present in this case.

Fall vs. Easton limited its decision to the square facts before it. The court stated:

> "The question is in narrow compass."

This Court further noted that even the Nebraska court had conceded the jurisdiction of the Washington court in the original divorce case to have directed the husband to make the deed to his wife of the Nebraska land. If that had been done, and the husband had obeyed that Order and made such a deed of conveyance, "even under the threat of contempt proceedings, or after duress of imprisonment," the Nebraska court would not have challenged the authority of the Washington court. The challenge was made and sustained because of the execution of a deed by the Washington court directly transferring the title to the Nebraska land. That, and that only, was held to be decided by the judgment of the Washington court.

There are two active corollary principles of law involved. They are ancient and honored principles firmly and universally imbedded in our jurisprudence.

Petitioner has elected to quote, at page 8 of the Petition, a paragraph of the Opinion in *Fall vs. Easton:*

> "The territorial limitation of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person."

Petitioner's basic premise herein is based upon an erroneous interpretation of that case.

Fall vs. Easton espouses the right of the State acting upon the person of the defendant, and not upon land situate in a foreign state, to rule upon property rights, as they did in the case sub judice. So, in *Fall vs. Easton*, the court continued:

> " . . . the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that, when the subject matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such case, the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party and obedience is compelled by

> proceedings in the nature of contempt, attachment, or sequestration. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated."

The case before this Court falls squarely within the "well recognized exception" defined in *Fall vs. Easton.* The injunction is an in personam decree operating upon a party over whom the court has personal jurisdiction. Obedience may be compelled by contempt proceedings within the State of Florida. The decree does not directly affect the title to the property in Pennsylvania. It is not a muniment of title.

Petitioner's reliance upon *Sharp vs. Sharp,* (Okla. 1916) 166 P. 175, *Barber vs. Barber,* [inaccurately referred to in the Petition as Barker vs. Barker] (Cal. 1958) 331 P. 2d 628, and *McRary vs. McRary* (N.C. 1948) 47 SE 2d 27, is not supportable.

Sharp vs. Sharp is a maverick case which erroneously interprets *Fall vs. Easton. Sharp vs. Sharp* is against the weight of overwhelming authority and is not good law. It should carry no weight whatsoever.

In *Sharp,* the Oklahoma court ruled that an Oregon court, having in personam jurisdiction over the parties, which decreed that the Plaintiff was the owner of specified real property in the State of Oklahoma, had not rendered a judgment in personam, insofar as the real estate was

concerned, but had rendered a judgment in rem, which was void.

Parenthetically, the Oklahoma court did recognize, although it did not apply, the principle of law that:

> "A court of chancery acting in personam may by its decree adjudicate the rights of the parties before it, even though such rights relate to lands in another state, but it may only make such decree effective by requiring, through process for contempt or otherwise, a conveyance by the party of the lands in question, thus indirectly affecting the title to the land in the foreign state, but it has no power by mere force of its decree to establish the title to such lands, or, in the absence of a conveyance by the party, to direct its master commissioner to execute a deed in his stead."

In *Barber vs. Barber*, the California court declared the universal principle under which this case was decided by the Florida court. But the California court ruled that because of the peculiar application of that principle unique to Oklahoma, as exemplified by *Sharp vs. Sharp*, that the California court would not recognize an Oklahoma decree, although it would recognize a decree of another state to like effect. This is clearly indicated in its opinion:

> "The next question is whether binding effect must likewise be given to the portion of the Oklahoma decree dealing with the real property. It is settled in California that a court having jurisdiction of the parties may adjudicate their rights to land located in another state and that the ad-

judication is res judicata and is to be accorded full faith and credit in the situs state regardless of whether the decree orders execution of a conveyance. Rozan vs. Rozan, 49 Cal. 2d 322, 330 et seq. 317 P. 2d 11. Although such a decree cannot in itself change or determine title, and while a subsequent action for that purpose must be brought in the situs state, an adjudication, for example, that one of the parties is entitled to the property is binding in the subsequent action. The rule of the Rozan case, however, cannot properly be applied to a judgment which may be collaterally attacked in the rendering state on the ground that it is void for lack of jurisdiction. Under Oklahoma law, even though a court has jurisdiction of the parties, its adjudication of their rights to land in another state is not res judicata but is void for lack of jurisdiction of the subject matter and may be collaterally attacked and set aside by the parties at any time. Sharp v. Sharp, 65 Okl. 76, 166 P. 175, 177 et seq. L.R.A. 1917 F. 562. Thus the provision of the Oklahoma decree relating to the real property would not be binding there, and it should not be given that effect here."

McRary v. McRary (supra) the third case relied upon by Petitioner is clearly distinguishable. In that case an Ohio court rendered a divorce decree which included a direction that the decree itself should operate as a conveyance of real property located in North Carolina.

The North Carolina court very properly rejected an attempt to use that decree as a muniment of title and declared the law:

"The familiar principle that a court having jurisdiction of the parties may, in a proper case, by a decree in personam, require the execution of a conveyance of real property in another state, or some other act in respect thereto, and to enforce its order through its coercive jurisdiction or authority is not here involved. The plaintiff seeks to establish the Ohio judgment as a muniment of title and to recover the locus on the strength thereof. That raises the question of the validity and efficacy of the Ohio decree as a judgment affecting the title and right of possession to land in North Carolina.

* * * * *

"[12] By means of its power over the person of the parties before it, a court may, in proper cases, compel them to act in relation to property not within its jurisdiction, but its decrees do not operate directly upon the property nor affect its title. The court's Order is made effectual only through its coercive authority."

The case of *Sharp vs. Sharp*, which constitutes the principal authority upon which Petitioner relies was a state court decision which was not reviewed by this court.

On the other hand, the case of *Allis vs. Allis* (U.S.C.A. 5th Cir. 1967) 378 F.2d 721, is a case which is squarely in point with the case sub judice. In addition thereto, a Petition for Certiorari was addressed to this court in the case of *Allis vs Allis and* certiorari was denied, 389 U.S. 953, 88 S.Ct. 1337. In view of this court's denial of certiorari, on facts in *Allis vs. Allis*, which are strikingly like those in

the case sub judice it would seem that this court would likewise deny certiorari in this case involving the same facts.

It will be noted that in this case, Mr. Simon was the owner of the property in Pennsylvania. No Order requiring any conveyance was necessary in order to vest title in him. A judicial determination of his ownership was made by the Florida court as a finding of fact.

Exactly that situation occurred and was noted in *Allis vs. Allis.*

In *Allis vs. Allis*, supra, a wife brought an action in the Texas courts for the purpose of establishing a claim by her of a special interest or equity in Texas realty. Her action was dismissed by the Texas court on the ground that she was estopped to bring suit in Texas to relitigate the question of title because that issue had been previously decided in favor of her husband in a Nevada divorce judgment, in which a *Finding of Fact* had been made that the property was owned by the husband. On appeal, that decision was affirmed by the U.S. Court of Appeal, 5th Circuit, the court stating:

> "Looking initially to matters of form, *it is apparent that the decree before us*, unlike that involved in McElreath, *fails to contain the readily recognizable in personam order directing the execution of a conveyance. It simply provides that the Collin County realty "was* at the time it was transferred by Plaintiff to Western Farms, Ltd., *the sole and separate property of the Plaintiff*, and such conveyance to Western Farms, Ltd., was a valid and effective conveyance."

"The absence of an express order to convey does not appear at all extraordinary, however, in view of the Nevada court's determination that title to the realty in dispute had at all times remained in appellee Allis. Under such circumstances, any order requiring appellant to convey title or to execute a release to appellee Allis of any interest she might claim in the realty would have been superfluous. * * *

Both spouses personally appeared in the Nevada proceedings, voluntarily subjecting themselves to the in personam jurisdiction of the Nevada court. In her counterclaim, appellant affirmatively invoked the power of that court to award the divorce to her and to adjudicate her interests in the marital property."

* * *

"As pointed out in the original opinion, if there be any semblance of fairness achieved in settling the property rights of divorcing persons holding property in two or more states, it must be done by a court operating in one jurisdiction. The problem cannot be adequately solved by the piecemeal attempts of several courts in several states."

Allis vs. Allis, (U.S.C.A. 1967) 378 F.2d 721, cert. den. 389 U.S. 953, 88 S.Ct. 337.

The controlling relationship between the facts in *Allis vs. Allis* and the facts in this case at bar are obvious. Respondent's counter-claim had affirmatively prayed adjudication of the rights and liabilities of the parties in their real and personal property;—the final judgment of divorce [A-1] affirmatively shows that the action proceeded to trial upon (among other things), the husband's counterclaim for "adjudication of the rights and interests of the parties in and to their real and personal property" and made a positive determination as a "Finding of Fact" with respect thereto. As stated in *Allis:* "under said circumstances [that title to the real property was already vested in the husband], any order requiring appellant to convey title or to execute a release . . . of any interest she may claim in the realty would have been superfluous."

It is submitted that the decision of the U.S. Court of Appeals, 5th Circuit, in *Allis v. Allis*, to which this Court denied certiorari, represents the overwhelming majority approach and overrides the decision of the Oklahoma Court in *Sharp v. Sharp*, which is the sole support relied upon by Petitioner.

In the following cases the court where the land was located specifically accepted *Findings of Fact* made in prior litigation between the parties by the court of another state and held such *Findings of Fact* to be res judicata and binding upon the parties in the state where the land was located:

McElreath vs. McElreath, (1961) 162 Tex. 190, 345 SW 2d 722, (where the Texas court held that *Findings of Fact* in an Oklahoma Divorce Decree were res judicata with respect to Texas land);

Rozan vs. Rozan (1957) 49 Cal.2d 322, 317 P.2d 11, which recognized that a California Divorce Decree would be entitled to res judicata effect in North Dakota to the extent that it determined the rights and equities of the parties with respect to North Dakota land. Subsequently, the same parties litigated the same question in North Dakota in a case reported as *Rozan v. Rozan*, (1964, N.D.) 129 NW 2d 694, wherein it was held by the North Dakota court that the *Findings of Fact* by the California Divorce Court that certain North Dakota property was acquired with community property funds was res judicata of that issue and was conclusive, in a North Dakota action, upon those parties who had been parties to the California action.

MacDonald vs. Dexter (1908) 234 Ill. 517, 85 NE 209, in which the Illinois court, applying the doctrine of res judicata, held that in Illinois proceedings involving Illinois land, a prior Missouri judgment in which the Missouri court found that plaintiff had no interest in the Illinois lands was binding upon him.

In *Dunlap vs. Byers* (1896) 110 Mich. 109, 67 NW 1067, it was held that the *findings* of an Ohio court that Michigan lands were partnership assets, were entitled to res judicata effect in subsequent Michigan proceedings.

A considerable number of additional cases of like effect are reported in the Annotation in 32 ALR 3rd 1338, et seq.

There is no question but that the power of the Florida court in a divorce action to determine the rights of parties, over whom it has personal jurisdiction, in their property, is not limited to property located in the state of Florida, but extends to all of their property, situate within or without the State of Florida.

The rule was announced at an early date in the State of Florida in the case of *Winn vs. Strickland* (Fla. 1894) 34 Fla. 610, 16 So. 606, wherein the Florida Supreme Court specifically asserted and adopted the universally accepted right of a court of equity having in personam jurisdiction over the parties, to render decisions in personam which will indirectly affect such title to foreign property. This was done by the lower court in the Final Judgment between the parties to this case.

> "When a court of chancery has acquired jurisdiction over the person of a party, in a proper case, it may, by virtue of its power to coerce obedience to its decrees, enforce the performance of contracts relating to lands situated in another.
>
> * * *
>
> "Although the decree in such case cannot of itself operate to transfer the title to lands situated out of the state, yet it is binding upon the consciences of the parties, and may conclude him in respect to all matters properly adjudicated and determined by this court. Such is the effect given to foreign judgments and decrees by the constitution of the United States in providing that full faith and credit shall be given to each state to the judicial proceedings of another state, and the

act of congress directing the manner in which such proceedings shall be proved, and the effect thereof."

Winn vs. Strickland, supra.

The State of Florida has, likewise, recognized the authority of courts of other states to adjudicate the rights of parties before them to Florida real estate and has held that such foreign adjudication is res judicata in a subsequent suit between the parties in Florida.

So, in *Jones vs. Jones*, (Fla.App. 1962) 140 So.2d 318, an action was brought in Florida by a former wife against a former husband, to establish a resulting trust in Florida property owned by the husband. Her action in Florida was based upon her claim that her former husband had acquired his interest in this Florida property with her money and for her. Prior to the Florida action, the parties had been divorced in the State of Kentucky.

No claim was made by the wife, and *no disposition was made by the Kentucky court in that divorce case of the Florida property which was held in the name of the husband.* The parallel to the instant case now pending before this court appears clear.

In the *Jones* case, the action brought in Florida by the wife, after the final decree of divorce rendered in Kentucky, was dismissed by the Florida court, which said:

"The divorce decree rendered in Kentucky . . . settled the property rights of the parties and barred this subsequent suit brought by the wife

to determine the question of property rights. That proposition is well settled under the law of Florida as well as in Kentucky. (citing many Florida and Kentucky cases.)"

A major annotation, entitled "POWER OF A DIVORCE COURT TO DEAL WITH REAL PROPERTY LOCATED IN ANOTHER STATE" is published in *34 ALR 3rd 962 through 987.*

The final contention of Petitioner, that the Florida judgment would not be entitled to full faith and credit, is contrary to the established law.

It is axiomatic that a valid decree entered in a divorce between parties over whom the court has personal jurisdiction, is entitled to full faith and credit, and facts established in that decree, the time for appeal of which has expired, are res judicata in a foreign state.

It is further axiomatic that the laws of Florida must be applied in construing the construction, operation and effect of the Florida judgment of divorce, by the courts of a foreign state.

The basic rules of construction and recognition of foreign divorces is stated:

"In general, the construction, operation, and effect of a foreign divorce decree are governed by the laws of the jurisdiction in which it was rendered. Accordingly, a decree of divorce will be given the same effect in any court within the United States as it has in the jurisdiction where it was rendered."

27 B CJS 857 (Div. §367)

There is a plethora of decisions, from practically every jurisdiction, which uniformly apply the principle stated. The following cases are representative:

Beebe vs. Brownlee, (1951 Ohio)
62 Ohio L. Abs. 377, 110 NE 2d 64
Affd. 63 Ohio L. Abs. 380, 381, 109 NE 2d 528;

Bowen vs. Bowen, (Iowa 1935) 258 NW 882;

Bozarth vs. Bozarth (La. 1967) 199 So.2d 344;

Cuevas vs. Cuevas, (Miss. 1966) 191 So.2d 843;

Ehrlich vs. Cohn (NY 1955) 145 NYS 2d 117;

Foster vs. Foster (Pa.) 70 Pa. Dist. & Co. 485
27B CJS 862;

Higgenbotham vs. Higgenbotham, (1966)
92 NJ Super 18, 222 A 2d 120;

Higgins (So. Dak. 1932) 245 NW 397;

Jones vs. Jones (Fla. 1962) 140 So.2d 318;

Kram vs. Kram (N.J. 1967) 237 A.2d 271;

Scheper vs. Scheper (So. Car. 1923) 118 SE 178;

Travelers Ins. Co. vs. Fields (USD Ct. Ky. 1971)
323 F.Supp. 387;

Wicker vs. Wicker (Nev. 1969) 451 P.2d 715.

In arriving at its ruling in *Cuevas vs. Cuevas,* supra, the Mississippi court stated the controlling principles of law which are applicable in this case:

> *"Inevitably cases will arise where property, real and personal, upon which those rights and obligations operate as between the parties themselves, in personam, will be situated in a state other than the forum state. The court having jurisdiction of the parties and of the marital res, may, and should, as between them, determine their legal rights and obligations with respect to such foreign property, although the court of the forum is without jurisdictional power to act directly upon title to foreign real estate. The final judgment of the forum court in such a case operates in personam, and is conclusive upon the parties in subsequent actions between them. It may form the*
>
> *basis of a suit in the state of the real property situs for enforcement by the courts of that state of the rights determined and declared in the original action which arose out of the marital relationship. In such event, the doctrine of collateral estoppel will operate to prevent relitigation of issues in the former suit, and, in a proper case, a judgment or decree will be entered by the court of the situs state based upon the foreign judgment and giving it effect."*
>
> *Cuevas v. Cuevas,* (Miss. 1966) 191 So.2d 843

So, also, in *Hick vs. Corbett* (1955) 130 Cal. App.2d 87, 278 P.2d 77, Cert. Denied, 349 U.S. 965, 72 S.Ct. 898,

this Court denied certiorari of a ruling by the California court, where the land was situated, that a Washington Court's judgment and Finding of Fact that plaintiff had no title or interest in California property, was res judicata so as to preclude the subsequent California action.

Whether or not the doctrine applied by the Florida court is "repugnant to Pennsylvania policy" as alleged by Petitioner at Page 14 of her Petition, is completely immaterial.

Petitioner specifically concedes that:

> "Florida law requires property claims between spouses be determined at the time of a divorce." [A-14]

That concession exposes the basic fallacy of Petitioner's position herein. The parties submitted themselves to the jurisdiction of the Florida court, from which court they sought a divorce. They were citizens and residents of Florida at that time, and they still are. The court had in personam jurisdiction over their persons and the parties were subject to all of the laws of Florida involved in a divorce action in that state. One of those laws, long embedded in the jurisprudence of Florida and, in fact, also recognized and applied in countless other state jurisdictions throughout the country, was re-stated by the District Court of Appeal in its opinion filed April 2, 1974 [293 So.2d 780], wherein it said:

> "The rule is firmly established that as in the case sub judice where the court has acquired jurisdiction to adjudicate property rights, a final dissolution of marriage judgment settles all property rights of the parties and bars any action thereafter by either party to determine property rights. Finston v. Finston, 160 Fla. 935, 37 So.2d 423 (1948); Smith v. Bollinger, Fla. App. 1962, 137 So.2d 881; Jones v. Jones, Fla. App. 1962, 140 So.2d 318; McEachin v. McEachin, Fla. App. 1963, 154 So.2d 894; Thompson v. Thompson, Fla. App. 1969, 223 So.2d 95; Henderson v. Henderson, Fla. App. 1969, 226 So.2d 699; Vandervoort v. Vandervoort, Fla. App. 1973, 277 So.2d 43. In addition, property claims must be put into issue in the dissolution of marriage action since the doctrine of res judicata is applicable even where property rights are not put into issue, if the issue could have been raised. Finston, supra; Cooper v. Cooper, Fla. 1954, 69 So.2d 881." [A-12-13]

Petitioner was aware of that law at the time of the trial of her divorce suit. After invoking the jurisdiction of the Florida court in the first instance, she attempted to escape the application of Florida law resulting therefrom, by changing her cause of action eight days before trial from one for divorce, [which required determination in the divorce action of all property claims between the parties] to one for separate maintenance, [which did not].

The Court allowed the withdrawal of Petitioner's action for divorce, as above indicated, but expressly reserved to Respondent all of his rights under his counter-claim for divorce in that same case. The Court thereby expressly preserved the court's jurisdiction to adjudicate all of the parties property rights within the divorce action which was pending before it.

The trial judge noted that the Petitioner was:

> ". . . well aware that failure to adjudicate these property rights in a final judgment dissolving marriage might bring into effect an adjudication thereof by operation of law." [A-8]

Petitioner elected to refuse to give testimony of her property claim in that Florida divorce case because (as she notes in her Petition at page 14) there is a difference between the law of Pennsylvania and the law of Florida with respect to property claims against each other of parties to a divorce. Petitioner elected to go court shopping and withheld the proof of her contention in the Florida divorce trial. It comes with bad grace from Petitioner to allege, as she does at Page 15 of the Petition:

> "And, in this connection it is no answer to state she had her chance to raise these issues in Florida and by failing to do that has now forfeited her claims, especially where it appears the trial judge denied she might litigate the issues in question and subsequently refused an amendment for the issues to be framed."

This is yet another extravagant distortion of the truth by Petitioner. The trial court never denied Petitioner the right to litigate the issues in question. Petitioner withdrew her claim, but the Final Judgment dissolving Marriage reveals that the Respondent's counter-claim expressly raised issue to determine all the rights and interests of the parties in and to their real and personal property, and the action proceeded to trial on that issue. [A-2]

As was stated by this Court in *Sherrer v. Sherrer*, (1948) 334 U.S. 343, 68 S.Ct. 1087, in words which fit exactly into the position of Petitioner in the instant case:

> "It has not been contended that respondent was given less than a full opportunity to contest the issue of petitioner's domicile or any other issue relevant to the litigation. There is nothing to indicate that the Florida court would not have evaluated fairly and in good faith all relevant evidence submitted to it. Respondent does not even contend that on the basis of the evidence introduced in the Florida proceedings, that court reached an erroneous result on the issue of petitioner's domicile. If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the state in which it was rendered."

Sherrer v. Sherrer, supra at 1091.

CONCLUSION

It is respectfully submitted that:

(a) The Petition for Certiorari should be dismissed; or

(b) Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed this 13th day of July, 1976 to Michael H. Egnal, 1315 Walnut Street Bldg., Philadelphia, Pennsylvania 19107.

Supreme Court, U. S.
FILED
AUG 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1733

SALLY LEE SIMON, *Petitioner*

v.

CHARLES SIMON, *Respondent*

REPLY BRIEF FOR PETITIONER

On Writ of Certiorari to the Supreme Court of Florida.

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PETITIONER'S ANSWER TO RESPONDENT'S BRIEF

As to the Respondent's Rejection of Petitioner's Factual Statements; Answered Seriatum.

1. A contention the proceeding in the lower courts is devoid of orders demonstrating that it would not accord full faith and credit to the Florida Injunction.

Subsequent to the original order of the Florida court, Philadelphia counsel for the respondent filed a motion for judgment on the pleading in reliance thereof and as each order of the Florida court affirmed the original order, there was filed an amended motion for judgment on the pleadings and lastly after the final summary judgment of October 24, 1974, an amended, amended motion for judgment on the pleadings. The attached appendix contains copies of the exemplified Prothonotary's docket entries of the Court of Common Pleas of Philadelphia County which show that all of the motions for judgment on the pleadings relying on the Florida judgment were denied. As recited in the petition for writ of certiorari, subsequently, a petition for reconsideration was granted on November 17, 1975, and further proceedings in connection with the law suits were stayed pending a final determination of the Florida litigation.

2. Respondent disputes the value of the Philadelphia real estate.

There is contained in the attached appendix a memorandum which was prepared on or about January 10, 1972, as a working paper incident to settlement discussions between prior counsel for the respondent and Philadelphia counsel for the petitioner. It reflects the notations made at the time. It lists the real estate involved, the encumbrances thereon and the net value which was at the time agreed upon. It shows the gross value to be $9,625,000 encum-

brances, $5,865,000, and the net value of $3,911,000. It may be assumed the values have increased since January 10, 1972.

3. As to the forgery of the petitioner's signatures on deeds.

The appendix includes an affidavit by Robert J. O'Neill, a questioned document examiner with the Police Department of the City of Philadelphia, with a prior experience of having examined approximately 18,000 questioned documents over a period of six years with appearances in every level of court administration. He examined two of the deeds. The one JRS 535, 414 included five parcels and the other JRS 565, 064, which included a substantial parcel.

4. This is again a reference to the successive motions for judgment on the pleadings and the response to number 1 is herein incorporated.

5. Respondent disputes the petitioner's statement that the Florida divorce judgment adjudicated only the Florida real estate owned by the parties.

The opinion of Judge Harding on the motion to dismiss (A8) appears to make it clear:

> ". . . and the court by order refusing to permit the amendment to pleading for not being timely filed, permitted and directed the matter to proceed without an adjudication thereof in the final judgment. . . .
> ". . . .
> "The court, in the dissolution action, did not have the property rights of the parties to the property in Pennsylvania before it as an issue to be determined by final judgment. Therefore, the final judgment did not adjudicate those property rights except as they may be adjudicated by operation of law. . . ."

Inasmuch as there was no adjudication of the Pennsylvania property rights, it would follow there could be no findings of fact with reference thereto.

It is respectfully submitted the balance of the statements made under respondent's number 5 are excerpts taken out of context.

It is also apparent from Judge Harding's opinion (A8) that the Pennsylvania actions had been instituted prior to the Florida divorce trial in which he said: "it was also known to the court that there was, as alleged in the plaintiff's complaint in the instant cause, pending the [sic] actions in the Pennsylvania courts relative to the interests of the parties therein."

6. The statement that the issues involved were not raised in the Florida proceedings is answered by Judge Harding's opinion at A8 where initially he said: "the Plaintiff seeks to enjoin the Defendant from proceeding in certain actions in the courts of Pennsylvania relative to the property rights of the parties in certain property allegedly owned by the Plaintiff in the State of Pennsylvania." Subsequently, he stated: "the parties were at one time married and their marriage was dissolved in the Circuit Court in and for the Eleventh Judicial Circuit, in and for Dade County, Florida, case number 68-19724.

. . . .

> "In the dissolution proceeding the husband, (Plaintiff here), sought to have property rights of the parties to the Pennsylvania property litigated and made a part of the final judgment of dissolution of marriage. These efforts were resisted by the wife."

In the memorandum of law filed on behalf of the respondent by his attorney, he argued as *Point I-C* "Florida courts have jurisdiction in a divorce action to make a determination of the rights and liabilities of the parties in

foreign realty." As *Point I-D*, "The Judgment of divorce entered between the parties constitutes a judicial determination of all property rights, is res judicata in any subsequent litigation." And, *Point II*, "The Florida final judgment of divorce is entitled to full faith and credit and the facts established therein are res judicata and a bar to prosecution of the actions in Pennsylvania."

In the District Court of Appeal (A13), Judge Harding in his final judgment dissolving marriage (A1), his order on the motion to dismiss (A8), summary final judgment for the plaintiff (A14), all relied on the principle that there was a determination of the title to Pennsylvania real estate by operation of law. Moreover, in the brief filed in the district court of appeal by Heller and Kaplan, Esquires, *Point 1* was "Whether the summary judgment was improvidently granted", and in the argument, reference was made to the forgeries. *Point* 2 argued the question of "Whether the Pennsylvania courts should give the Florida judgment full faith and credit," and the argument emphasized "the absence of any citation for the proposition wherein a court of equity has permitted an operation by law "res judicata" concept, to be used as a sword in a case involving fraud and forgery without a complete hearing". *Point* 3 argued "Whether it was erroneous to enjoin foreign actions involving separate issues of third parties."

ARGUMENT

I. The controversy involves the application of one of two doctrines—whether the Florida result affected Pennsylvania real estate directly or indirectly.

It may be said that the legal arguments confronting this Court involves the two basic doctrines as stated by Mr. Justice McKenna in the majority opinion of *Fall v. Easton*, 215 U.S. 1, 30 S.Ct. 3, 54 L. Ed. 65 (1909),

> "[T]he doctrine that the court, not having jurisdiction of the res, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established * * * [I]t rests, as we have said, on the well-recognized principle that when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. In such case, the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment or sequestration. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. 3 Pomeroy's Eq., §§1317, 1318, and notes."

The cases which discuss either one or both of the doctrines have been collected in 34 A.L.R. 3d. Beginning at page 968, the authorities support the concept a divorce court in one state does not have the power to directly affect, by means of its decree, the title of real property situate in another state. At page 975, are the cases which dicuss the power of a court of equity with personal jurisdiction over a party to indirectly affect real property in another state by means of an in personam decree operating upon the party over whom the court has jurisdiction. The cases recited in the respondent's brief came principally from the foregoing.

The essence of the cases cited by the respondent is a determination the court had before it an equitable suit in personam latched to a personal obligation of the respondent arising out of a contractual relationship, an equitable distribution by a divorce court of marital property which does not contravene policy and the like.

It will be observed that the action of the Florida court does not rise to the level of a decree or award.

It has availed itself of the doctrine, individual to the State of Florida, under the facts in the instant case that the property rights of the parties to the Pennsylvania real estate was determined by operation of Florida law.

It was obviously a fact in the Florida proceeding the Pennsylvania property was in the name of the husband (A-8). However, it does not appear arguable there was any finding of fact determining Pennsylvania title as it is eminently clear there was no adjudication with reference thereto (A-8).

The respondent's principal reliance is on *Allis v. Allis*, 378 F.2d 721 (5th Cir. 1967), discussed at pages 30 through 33 of his brief.

It is respectfully submitted *Allis* falls within the category of the cases which find support in a determination that there is a personal obligation for the transfer of title

In passing, it might be noted even where such circumstances are present the decree does not become self-executing in the state of the situs but rather leaves it to that state to determine whether the award or decree of the domestic state shall be enforced on the basis of comity or the principle of res judicata.

In *Allis*, the parties litigated in the Nevada court the equitable division of the marital property and a reasonable sum by way of alimony.

The court made its decision "after a full trial on the merits, . . ." (723). At page 725,

> ". . . Both spouses personally appeared in the Nevada proceedings, voluntarily subjecting themselves to the in personam jurisdiction of the Nevada court. In her counterclaim, appellant affirmatively invokes the power of that court to award the divorce to her and *to adjudicate her interests in the marital property.* She did not at that time, nor does she now urge that the in personam jurisdiction thus acquired by the Nevada court was in any respect improper. . . ." (Emphasis Supplied)

The court referred to the Texas case of *McElreath v. McElreath*, 162 Texas 190, 340 S.W. 2d 722 (1961), and called attention to the recognition of the ". . . foreign decree on principles of comity rather than the doctrine of full faith and credit", and amplified this by quoting at page 724:

> ". . . Our holding therefore is that as a matter of comity we will enforce the equitable decrees of a sister state affecting Texas land so long as such enforcement does not contravene an established public policy in this State."

Had Judge Harding permitted a hearing on the merits as to the Pennsylvania property titles, it would of necessity

have brought into play Pennsylvania law, the alleged forgery in the execution of the deeds and the absence of any consideration. If pursuant thereto Judge Harding had made a determination as to the Pennsylvania titles, it would appear that *Allis* would be applicable.

However, it may be reiterated the Florida court was wanting in all of the said respects. The respondent now seeks to give the result under the unique Florida laws an effect which would deprive petitioner of her interest in the Pennsylvania real estate without a right to be heard.

In the more recent case of *Estabrook v. Wise*, 506 S.W. 2d 248 (Texas 1974), the court again had before it a controversy as to distribution of marital property which consisted of real estate in a foreign state and asserted not to have been disclosed by the husband in the divorce action. The decision discusses the two concepts which are referred to hereinabove. It makes the distinction between an action which directly affects the real estate and an action which affects the person and indirectly the real estate. At page 252, the court said:

> ". . . We do not disagree with these cases to the effect that a Texas court does not have power or jurisdiction to render a judgment or decree which acts directly upon the title to real property situated in another state. . . ."

In that case, as in *Higginbotham v. Higginbotham*, 222 A.2d 120 (N.J. 1966), the New Jersey court had before it the question as to whether to accord full faith and credit to an action which was grounded on the right of the Florida court to make an award of real estate as part of alimony, at page 129:

> ". . . We do not consider that Florida's award of lump sum alimony, in the form of ordering a conveyance in lieu of money payment, so offends New Jersey policy as to call for our denying full faith and credit to its decree. And we perceive no interference with our

policy regarding land titles if plaintiff is given the relief she seeks—at least under the circumstances of this case."

II. Supplement as to the Florida result without a consideration of the merits.

In the Petition for Certiorari, there is a discussion at Subsection C (page 12), "Judgments in foreign states not on the merits or where an issue is withdrawn by the first court, cannot act as res judicata to claims in Pennsylvania."

There is a desire to supplement the discussion with the following:

In *Buchanan v. Banks*, 192 Pa. 516 (1899), the dismissal of a petition to open a judgment, on the ground of *res judicata*, was reversed. At page 525, the Pennsylvania Supreme Court articulated the policy reasons which compelled such a result:

> "The most important question then developed was whether she had a right to be heard in the courts when she certainly did have a cause that required a hearing. It is one thing to decide against litigant, but it is a very different, and far more important, thing to decide that a litigant shall not be heard at all. This particular litigant was so situated that she had but one thing she could do. A judgment was entered against her, not by her own act, but by the act of her adversary under an assumed contract right to do so. She must get rid of that judgment in order to assert her rights and have them actually tried. She attempted to get this opportunity in the only way it could be done, by asking to have the judgment opened, and she was not allowed to have even the opportunity to be heard. And because she was denied this opportunity in the beginning, she was denied it all the way through the subsequent proceedings. This was the

> radical error of the case, and when it was repeated on the last application to open judgment, she had a just cause of appeal to this court. When this judgment has been opened, and she has been allowed to be heard on the merits of her case, if it is then decided that the merits are against her, she at least cannot complain that the doors of the temple of justice have been closed against her."

See also *Pusey's Estate*, 321 Pa. 248, 270 (1936).

In *Makariw v. Rinard*, 336 F.2d 333 (3d Cir. 1964), *rev'g*, 222 F. Supp. 336 (E.D. Pa.), a dismissal of a complaint on the ground of *res judicata* was reversed. Judge Kalodner pointed out that the plaintiff

> "[h]as not had her day in court on the critical issues which premise her suit, and therefore, it was error to dismiss her action before its merits were litigated." 336 F.2d at 336.

To the same effect is *Tomiyasu v. Golden*, 358 F.2d 651, 654 (9th Cir. 1966):

> "The circumstances of this claim are unusual, to say the least. But the claim does raise a genuine issue of fact which we do not think the district court was entitled to ignore. If the contention that appellants were not parties to the prior state court action is true, and for the purposes of reviewing the summary judgment below we must assume that it is true, then it would appear that these appellants have not had their day in court and should not be barred by a plea of res judicata from attacking the judgment of the Nevada court insofar as that judgment purports to affect their interest in the property involved. In the first instance, then, the court below erred in disposing of this cause upon appellees' motion for summary judgment."

III. On the timeliness of the Petition for Writ of Certiorari.

In the argument before Judge Harding on the motion for a stay pending the filing of a petition with this Court for a stay pending a review on certiorari, counsel for the respondent argued that petitioner had no standing to take an appeal to the United States Supreme Court because it was not timely. Judge Harding rejected the contention.

The petition to the Florida Supreme Court for a Writ of Certiorari was noticed on October 10, 1975, and the petition was supported by a brief assigning seven different points citing nine different decisions by the District Court of Appeals of Florida and two by the Supreme Court of Florida seeking to demonstrate that the issue was a proper one for consideration by the Supreme Court (A19). The final decision by the Supreme Court was made on March 10, 1976, and the Petition for Writ of Certiorari was filed on May 28, 1976.

The respondent relies upon *Nash v. Florida Industrial Commission,* 389 U.S. 235, 237, 88 S. Ct. 362, 365 (1967). The respondent omitted to disclose that the appeal was from the Florida Industrial Commission Unemployment Compensation Board of Review, and Mr. Justice Black stated at page 365:

> ". . . Since such denial by the Florida District Court of Appeal apparently precludes further state review, we granted certiorari because of the important constitutional question involved, specifically whether the Commission's ruling violates the Supremacy Clause of the Constitution (Art. VI, cl. 2) because it allegedly 'frustrates' enforcement of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §151, et seq."

Again, in the footnote at page 365:

> "1. The Florida Supreme Court seems to have decided that it lacks jurisdiction by appeal to consider *per curiam* denials of certiorari by the Florida District Court of Appeal. Callendar v. State, Fla., 181 So. 2d 529. While it is true that a district court of appeal may certify a question "of great public interest" to the Florida Supreme Court, this is done upon the district court of appeal's own motion, and although litigants may file a suggestion that a particular question be certified, such suggestion has been declared to have "no legal effect." See Whitaker v. Jacksonville Expressway Authority, 131 So.2d 22 (1st D.C. App. Fla. 1961). Thus, it is impossible for us to say that under Florida law petitioner have had any right to call upon the State Supreme Court for review. In these circumstances, we therefore are unable to say that the District Court of Appeal was not the highest court in Florida wherein a decision could be had as required by 28 U.S.C. § 1257(3)."

It is apparent that the limitation of appeal in *Nash* is not present in the instant case.

CONCLUSION

In this proceeding, the petitioner seeks to avert deprivation of her property without the opportunity to be heard and to establish the ineffectiveness of the Florida determination.

If the Florida result has the efficacy which respondent asserts, he will have the opportunity to demonstrate the same in Pennsylvania where legal principles indigenous to that state will be considered in determining the titles. This would appear to be among others a raison d'etre for the limitation of a state to affect titles in a foreign state directly.

Respectfully submitted,

Michael H. Egnal
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that 3 true and correct copies of the within Answer to Respondent's Brief and Appendix were mailed this 3rd day of Aug. 1976, to Jack D. Burris, 420 Lincoln Road, Miami Beach, Florida 33139.

MICHAEL H. EGNAL
Attorney for Petitioner

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

No. —, Vol. 6

December Term, 1971 No. 4056

SALLY LEE SIMON

v.

CHARLES SIMON & SANDRA PENNOCK, Defts. & Garnishees to wit:
GIRARD BANK & THE FIRST PENNA. BANK & TRUST CO. &
INDUSTRIAL VALLEY BANK & TRUST CO. &
FRANKFORD TRUST CO., Garnishees

Be It Remembered, that I, AMERICO V. CORTESE, Prothonotary of the Court of Common Pleas, Vol. 6, for Philadelphia County, do hereby certify that the following is a true and correct copy of a Part of DOCKET ENTRIES in the above case:

Mar. 14, 1975 Ordered that the defendants Charles Simons Motion for Judgment on the Pleadings is denied.

Mar. 14, 1975 Order entered. Dandridge, J.

Mar. 14, 1975 Ordered that the Deft. Charles Simon's amended, amended Motion for Judgment on the Pleadings and the amended Motion for Judgment on the Pleadings and the Original motion for Judgment on the Pleadings is denied.

Mar. 14, 1975 Order entered. Dandridge, J.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 18th day of April in the year of our Lord one thousand nine hundred seventy-five (1975).

/s/
Americo V. Cortese
Prothonotary
1980

[SEAL]

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

No. —, Vol. 6

December Term, 1971 No. 4136

SALLY LEE SIMON

v.

CHARLES SIMON

Be It Remembered, that I, AMERICO V. CORTESE, Prothonotary of the Court of Common Pleas, Vol. 6, for Philadelphia County, do hereby certify that the following is a true and correct copy of a Part of DOCKET ENTRIES in the above case:

Mar. 14, 1975 Ordered that Deft. Charles Simon's Motion for Judgment on the Pleadings is denied.

Mar. 14, 1975 Order entered. Dandridge, J.

Mar. 14, 1975 Ordered that the defendant Charles Simons amended, amended Motion for Judgment on the Pleadings and the amended Motion for Judgment on the Pleadings is denied.

Mar. 14, 1975 Order entered. Dandridge, J.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 18th day of April in the year of our Lord one thousand nine hundred seventy-five (1975).

/s/
Americo V. Cortese
Prothonotary
1980

[SEAL]

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

No.

September Term, 1971 No. 2113

SALLY LEE SIMON

v.

CHARLES F. SIMON

Be It Remembered, that I, AMERICO V. CORTESE, Prothonotary of the Court of Common Pleas, for Philadelphia County, do hereby certify that the following is a true and correct copy of a Part of DOCKET ENTRIES in the above case:

March 14, 1975. Ordered that the Deft. Charles Simons Motion for Judgment on the Pleadings is denied. Order entered. Dandridge, J.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 18th day of April in the year of our Lord one thousand nine hundred seventy-five (1975).

/s/
Americo V. Cortese
Prothonotary
1980

[SEAL]

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

No.

December Term, 1971 No. 3508

SALLY LEE SIMON

v.

CHARLES SIMON AND JOSEPH H. SIMON, M.D. AND
BEVERLY W. SIMON

Be It Remembered, that I, AMERICO V. CORTESE, Prothonotary of the Court of Common Pleas for Philadelphia County, do hereby certify that the following is a true and correct copy of a Part of DOCKET ENTRIES in the above case.

March 14, 1975. Ordered that the Defendant Charles Simons amended motion for judgment on the pleadings and the amended motion for judgment on the pleadings is denied. Ordered entered. Dandridge, J.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 18th day of April in the year of our Lord one thousand nine hundred seventy-five (1975).

/s/
Americo V. Cortese
Prothonotary
1980

[SEAL]

DESCRIPTION OF PROPERTY	VALUE	ENCUMBRANCE	NET VALUE
Academy Plaza Shopping Center	$2,500,000	$1,438,000	$1,062,000
Bells Corner	$1,300,000	$ 203,000	$1,097,000
Bells Corner Annex	$ 300,000	$ 53,000	$ 247,000
N. W. side of Millbrook Rd.; Millbrook Apts., 102 apts.	$1,200,000	$ 960,000	$ 300,000
S.W. side of Woodhaven; Vacant Land to Whiting	$ 100,000	$ 25,000	$ 75,000
S.E. side of Academy Rd.; N.W. side of Cantebury Rd. (Medical Center)	$ 200,000	$ 34,000	Varying from 45% to CS to 100% $ 80,000
Balance Ground, Academy and Cromwell Roads	$ 200,000	$ 50,000	$ 150,000
Havenwood Shopping Center (gas station out)	$ 180,000	$ 117,000	$ 60,000 (total equity)
Keystone and Devereaux	$ 20,000	None	$ 300,000
Red Lion Village Complex; 25 apts.	$3,250,000	§I $1,350,000 §II $1,600,000	CS interest 67½%
		$2,950,000	$ 200,000
Sisters Ground—Drainage right of way	$ 200,000		$ 200,000
Bay Ha. oor Island, Miami	$ 175,000	$ 35,000	$ 140,000
	$9,625,000	$5,865,000	$3,911,000

A24

Note 1 In Deed Book JRS 535, p. 414, September 22, 1969, conveying Academy Plaza Shopping Center, Bells Corner, Cromwell and Academy Rds., Keystone Street and to Millbrook Rd.; Affidavit of Charles valuing property at $3,000,000.

Note 2 In Deed Book CAD 985, p. 347, May 26, 1967, Academy Plaza, Inc. to Charles Simon and Sally Simon, Academy Plaza Shopping Center subject to mortgages of: $1,200,000 and $300,000; Affidavit of Charles Simon that fair value of property is $1,500,000.

Note: Portion in trust for children; lump payment excess of 10 yr. periodic tax to recipient

Note: Cost of Apt. $11,000-$12,000 subject 75-80% Shopping Ctr. 20 to 25 sq. ft.

Note: Cost Apt. unit $12,000
Land Value at $1,000 unit

A25

COMMONWEALTH OF PENNSYLVANIA ss: (AFFIDAVIT)
COUNTY OF PHILADELPHIA

ROBERT J. O'NEILL, being duly sworn according to law, deposes and says for a period of six years, he acted as a document examiner for the Police Department of the City of Philadelphia, in which connection he examined approximately 18,000 documents as to handwriting, identifications, handprinting, typewriters, charred documents, erasures and problems relative to questioned documents.

On September 30, 1974, there was submitted to me for the purpose of determining whether the handwriting shown as the signatures in the two described deeds were in the handwriting of Sally Lee Simon. The questioned documents were as follows:

Q-1 One (1) machine copy of a deed between Charles Simon and Sally Lee Simon to Charles Simon. Dated—September 22, 1969. Page number D-535,-414, of this document bears the questioned Sally Lee Simon signature.

Q-2 One (1) machine copy of a deed between Charles Simon and Sally L. Simon, H/W, aka Sally Lee Simon to Joseph H. Simon and Beverly W. Simon, H/W. Dated—November 10, 1969. Page number D-565-064 of this document bears the questioned Sally Lee Simon signature.

Standards for Comparison

S-1 Three (3) white sheets of paper each bears a Sally Lee Simon signature, submitted as the known signatures of this person.

S-2 One white sheet of paper (machine copy) of a document. Page number 17 bears a Sally Lee Simon signature submitted as the known signature of this person.

RESULTS OF EXAMINATION

Examination and comparison of the questioned Sally Lee Simon signatures with the known signatures of Sally Lee Simon submitted has shown differences of handwriting habit which cannot be accounted for. This precludes an identification of Sally Lee Simon as the writer of her signatures of the Q-1 and Q-2 documents. It is noted the Q-1 and Q-2 documents are copies; however, the differences that exist are clearly visable. It is not felt an examination of the original would alter this opinion.

All of which deponent avers to be true and correct.

/s/
ROBERT J. O'NEILL

Sworn to and Subscribed
before me this 22nd day
of July, 1976.

DEBORAH JOAN SAITTA

Notary Public

My Commission Expires:

[Notarial Seal]

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires September 19, 1977